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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Case No. 1007

J. HARVEY CROW, *Petitioner*

vs.

RICHARD P. FAULKNER ET AL., AS DISBARMENT COMMITTEE, *Respondent*

PETITION FOR WRIT OE CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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Case No.

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PETITION FOR WRIT OE CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

J. Harvey Crow, petitioner, respectfully prays that a writ of certiorari issue to the Supreme Court of the State of Ohio to review the decision and judgment of that court and the judgment of the lower courts which the Supreme Court of Ohio refused to review and the order denying petitioner's application for rehearing in Case No. 35368 in which the Supreme Court of Ohio denied the application for rehearing and judgment was rendered on the 15th day of January, 1958.

The proceeding against the petitioner originated in the Court of Common Pleas in Champaign County, Ohio which

court rendered judgment without writing any opinion on the 13th day of May, 1955, which judgment was reversed by the Court of Appeals of Champaign County, Ohio for a separate finding of fact and conclusion of law.

The same trial judges made a finding of fact and conclusion of law and entered judgment against the petitioner on the 16th day of August, 1956, which judgment was affirmed by the Court of Appeals of Champaign County without setting forth any reasons for their opinion. The Supreme Court of Ohio refused to allow the Motion to Certify, refused to review the matter upon the application of the petitioner as a matter of right saying that there was no constitutional question involved.

JURISDICTION OF THIS COURT

The judgment of the Supreme Court of Ohio of which review is sought which as a matter of fact affirmed the judgment of the Court of Common Pleas entered on the 13th day of May, 1955 and again entered on the 16th day of August, 1956 the order denying petitioner's application for rehearing from review is sought was dated January 15, 1958.

Jurisdiction to review aforesaid judgment and order is conferred on this Court by the act of June 25, 1948, c. 646, 62 Statute 929, Title 28, U.S. Code, Section 1257. Portions of that section pertinent to jurisdiction in this review provide as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> "(3) By writ of certiorari, • • • where any title, right, privilege or immunity is specially set up or claimed under the Constitution • • • or statutes of • • • the United States."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Directly involved in this review are,

(a) The 5th Amendment to the United States Constitution

(b) The 14th Amendment to the United States Constitution

(c) Article IV Sec. 1 and 3 of the Constitution of Ohio provides for the various courts of the State and provides one judge for each county of the State of Ohio.

(d) Revised Code 2301.02, Said statute creates one judge in Champaign County, Ohio

(e) R. C. 4705.02 provides for disbarment of attorneys. This petitioner was charged and tried under this statute.

(f) R.C. 2307.32-2307.39 establishes venue of actions in Ohio.

(g) R.C. 2701.03 provides the procedure and time for filing affidavits of prejudice against judges of Common Pleas Court.

(h) Article IV Sec. 18 of the Constitution of Ohio gives power and jurisdiction to Common Pleas Court in chambers as directed by law.

(i) R.C. 2301.05 provides for terms of court.

(j) R.C. 2317.16 involves witness compelled to go to testify in civil action.

(k) R.C. 2319.06, R.C. 2319.16 and R.C. 2319.26 relates to taking of depositions.

QUESTIONS PRESENTED FOR REVIEW.

I. Did the trial Court and the appellate courts including the Supreme Court of Ohio which affirmed said judgment, deprive the petitioner of his Constitutional rights without due process of law in violation of the 5th and 14th amend-

ment to U.S. constitution by denying the petitioner a fair and impartial trial, in their refusal to grant a continuance after the court overruled the Motion to quash service of summons?

(a) Was the petitioner granted due process when the trial court refused to grant a continuance for the purpose of taking depositions to support the petitioner's defense in said disbarment action?

(b) Was the petitioner granted due process when the trial court compelled the petitioner to trial immediately after overruling motion to quash, without giving the accused time to investigate the charges, time to prepare for trial or time to investigate the witnesses to be used by the Committee?

(c) Was the petitioner granted due process when the trial court compelled the petitioner to trial immediately after overruling the motion to quash without giving the accused time to have certain trial lawyers present who were then engaged in trial elsewhere?

(d) Was the petitioner granted due process when the trial court compelled the petitioner to trial immediately after overruling motion to quash without giving the accused time to issue subpoenas?

II. Did the trial court and the appellate courts including the Supreme Court of Ohio which affirmed said judgment deprive the petitioner of his constitutional rights without due process of law in violation of the 5th and 14th amendment to U.S. constitution by denying said petitioner's procedural due process?

(a) Was the petitioner granted due process when the trial court consisted of three judges when the Ohio Constitution provides for only one?

(b) Was the petitioner granted due process when he was required to defend said action in Champaign County,

Ohio two hundred miles from his home, especially since service of summons was not made on him in Champaign County?

(c) Was the petitioner granted due process when he was required to present his case to the Supreme Court of Ohio with Chief Justice sitting on the bench after he was requested to withdraw since his action appointing three judges to hear the case was challenged by said petitioner?

III. Did the trial court by proceeding to enter judgment against this petitioner, and the appellate courts including the Supreme Court of Ohio which affirmed said judgment, deprive the petitioner of his constitutional rights without due process of law in violation of the 5th and 14th amendments to U.S. Constitution by denying said petitioner a hearing before a fair and impartial tribunal, after an affidavit of prejudice was filed and before the same was heard as provided by laws of Ohio?

(a) Did the trial court afford the petitioner procedural due process by entering judgment on August 16, 1956 when the court of Common Pleas was adjourned?

STATEMENT OF FACTS

The transcript, Bill of Exceptions and the Application for Extension of Time filed in this court shows the following facts:

This proceeding for disbarment was commenced against Petitioner in the Court of Common Pleas of Champaign County, Ohio.

On February 4, 1955 the Judge of the Court of Common Pleas of Champaign County, Urbana, Ohio made an order appointing a committee—Transcript "A"—page 2—and—within twenty four hours on February 5, 1955 the committee so appointed filed charges for disbarment in a civil case against this petitioner—Transcript "B"—pages 3-11—con-

sisting of nine (9) legal cap pages and containing eleven (11) specifications. The charges indicate they had been signed by all members of the committee so appointed. Transcript "B"-1"—pages 12-15 shows the 6½ charges that were abandoned the day the trial began or during the course of the trial. The one who was in Florida at the time had not signed the charges—Transcript "C"—pages 97 and 98.

The Committee made no investigation whatsoever as a Committee. Application for Extension of time Exhibit D. Sub. Sec. "C, D, E, F, G, H, I, J, and K."

The petitioner was never informed by the local Judge or any member of the Committee about any charges, nor was he ever requested to make any explanation to the Committee about them.

These facts, together with the abandonment of 6½ charges before trial began or during trial smacks with the idea of a conspiracy.

This petitioner had hundreds of clients and was opposed on the other side by numerous lawyers inside and outside of Champaign Co., Ohio, but there was no complaint. Many lawyers said this petitioner's conduct was honorable and proper.

This petitioner's clients were of this same opinion.

Petition for Extension of time Exhibit "L and M."

The local Judge of Champaign County assigned the case for trial April 18th and requested another Judge to hear the case—Transcript "D". Page 99.

No charges were filed in the Clerk's Office, nor did Judge Owens know anything about them, the local Judge said on page 57 of Transcript C, "I knew nothing of any of them."

Page 55—Transcript C, he says, "I do not work through them." *"Them"* meaning the Grievance Committee. A

reading of Judge Owens' testimony, pages 53-66—Transcript C, would indicate, a cagy, deceptive and evasive person. This Judge appointed the Committee.

What reason or justification did he have for placing on record an entry appointing a committee?

Any complaints should be a matter of public record, not a whispering conspiracy.

The Chief Justice of the Supreme Court of Ohio, who is authorized to make such appointments, assigned three judges to hear this disbarment case, assigned for hearing April 18th, 1955.

The three Judges filed their appointment with the Clerk's Office on April 18th, 1955, having been appointed on April 7th, 1955—Transcript "E". Pages 100-102.

Prior to the date set by the local judge for hearing, this petitioner filed a motion to quash—Transcript "F". Pages 103 to 120.

This petitioner in said Motion challenged the jurisdiction of the Court in an action in personam when personal service was not made in the County where the action was filed. The petitioner appeared specially for the Motion only, not intending to enter his appearance in said action.

The matter came before the Court on April 18th, 1955 at 9:30 A.M. when the Judges first met after their appointment and took up for consideration the Motion to Quash.

On April 11th, 1955, the Committee issued twenty-four (24) subpoenaes to certain witnesses in six counties in this State—Transcript "G". Pages 121 to 141.

The petitioner had not filed a precipe or caused to be issued any subpoena for any witnesses prior to April 18, 1955, for to do so, would have waived this petitioner's right to rely upon his Motion to Quash service of summons.

After petitioner was required to proceed to trial, he issued subpoenas for certain witnesses who failed to respond to subpoena. Transcript "G-1". Pages 142-146.

This petitioner, at that time, lived in Cuyahoga County and maintained his law office in Cleveland, 200 miles from Urbana, Champaign County, Ohio.

On April 18, 1955, this petitioner was in his office in Cleveland, Ohio—Transcript "C"—page 32.

This petitioner had employed two attorneys to appear on April 18, 1955 to submit the Motion to Quash service—Transcript "C"—page 34.

Said petitioner had conferred with certain trial attorneys who were willing to represent this petitioner but were engaged in trial of other cases on April 18 and 19, 1955—Transcript "C"—page 84.

This petitioner on April 18, 1955 through his attorney requested a continuance of trial for the following reasons, (Transcript "C"—pages 23-28.

(1) To file Motions—Transcript "C"—page 23.
(Motion overruled by Court—Transcript "C"—page 24)

(2) To file Demurrer—Transcript "C"—page 25.

(Overruled by Court—Transcript "C"—page 26)

(3) To take depositions—Transcript "C"—page 26.

(Overruled by Court—Transcript "C"—page 27)

(4) To file written Answer—Transcript "C"—page 26.

(Overruled by Court—Transcript "C"—page 27)

(5) To continue until 1:00 o'clock P.M. (same day) to prepare and serve notice to take depositions—Transcript "C"—page 28.

(Overruled by Court—Transcript "C"—page 28)

On April 19, 1955 this petitioner personally made motions for continuance of trial for the purpose of:

(1) Filing written motions—Transcript "C"—page 39.

(2) Filing written demurrer—Transcript "C"—page 39.

(3) Filing written Motion to Strike—Transcript "C"—page 39.

(4) Preparing and filing written Motion to make definite and certain—Transcript "C"—page 39.

All of which motions were overruled by the Court.

(5) Filing written Motion for assignment of case in accordance with Statutes—Transcript "C"—page 40.

(Motion overruled by Court—Transcript "C"—page 40)

(6) Request to make oral Motions—Transcript "C"—page 40.

(Request denied by Court—Transcript "C"—page 40)

(7) Motion for continuance to secure service of trial attorneys who were not available on April 19, 1955—Transcript "C"—page 86.

(8) Motion for continuance to take depositions—Transcript "C"—pages 85 and 86. (Overruled,)

(9) Motion for continuance to subpoena witnesses—Transcript "C"—pages 85 and 86.

(Overruled by Court.)

(10) Motion made at 2:30 P.M. on April 19, 1955 for continuance until 9:30 A.M. April 20, 1955 (Next day) to prepare and file a written answer—Transcript "C", page 87.

(Overruled by Court—Transcript "C"—page 88)

The Committee, through Mr. Faulkner, requested the Court to abandon certain specifications.—Transcript "C" —page 37. They were permitted to abandon Specification No. 3, part of No. 4, all of No. 6, and No. 10.

Mr. Faulkner, speaking for the Committee—Transcript "C", pages 37 and 38 said:

> "Wish to point out to the court at this time that there are several specifications, which we desire to abandon. I specifically refer to Specification No. 3, which the principal witness now wished to withdraw. Specification No. 6, wherein we have been unable to locate the necessary witness at this time. Specification No. 10—in this instance the witness is in a Dayton hospital with a spine injury or operation, and is not available as a witness or a deposition; and then the latter part of Specification No. 4, alleging procuring of one Howard Rust in regard to a divorce. Mr. Rust now refuses to assist that witness, and we desire to abandon at the present time that portion of the specification.'

Mr. Faulkner did not know that the principle witness in regard to Specification No. 3 had made an affidavit (See the Application for Extension of Time to file Petition for Certiorari, Exhibit "D" subsection C-1) prepared for him by William Coleman (now democratic chairman for State of Ohio) of Marysville, Ohio.

The Committee refused to offer any evidence regarding Specifications Nos. 8, 9 and 11 and upon Motion of the petitioner (Transcript "C"—pages 95 and 96), charges were dismissed.

Why would the Committee ever abandon any charges against this petitioner or refuse to offer evidence on those charges standing but not abandoned, if the Committee had made an honest and proper investigation or any investigation at all and were justified in filing them in the first place?

The trial lasted eight days, several hundred pieces of paper were offered in evidence yet the Court in less than 45 minutes, decided the case, prepared an Entry and made telephone calls out of town.

They wrote no opinion, only prepared the Entry—Transcript "H"—page 147.

Rules of Court provide, attorney shall prepare the Entry, Court only announces judgment by opinion or otherwise—Transcript "I"—page 148.

The Court of Appeals for Champaign County issued Stay of Execution—Transcript "J"—page 149.

A motion to vacate stay was made by the committee—Transcript "K"—page 150.

Court of Appeals wrote opinion. Transcript "L"—pages 151-153. 135 N.E. 2d, 281 and again issued a stay of execution—Transcript "M"—page 154.

The Court of Appeals heard the appeal on questions of law and wrote an opinion—Transcript "N"—pages 156-164. 73 O.L.A. 421.

A journal entry was prepared by the petitioner, approved by the parties and by the Court and filed April 7, 1956.—Transcript "O"—pages 164-165. This reversed the judgment of the trial Court.

This petitioner then filed an Affidavit of Prejudice to prevent the Trial Judges from considering the case any further—Transcript "P"—pages 167-174.

A copy of the Entry of Disqualification filed August 15, 1955 by Judge John P. Case referred to an Affidavit of Petitioner is found in the Application for Extension of Time filed in this Court and marked Exhibit "D' subsection "S" and a dozen or more other like entries were filed in

Court by this same Judge whenever the petitioner was attorney of record and Judge Case was on the bench.

An Affidavit of Prejudice was filed June 12, 1956 by Joseph Osborn against Judge Kirk, who was appointed to sit in this disbarment trial. Application for extension of time to file Petiton of Certiorari Exhibit P. Both of these judges had always stepped aside from hearing any case when the petitioner was the attorney of record and these two judges by virtue of their office would be on the bench after May 13, 1955 and prior to August 16, 1956.

The Chief Justice of the Supreme Court of Ohio is required to hear an Affidavit of Prejudice but before he set this matter down for hearing, the same trial judges made and filed a finding of fact and conclusion of law — Transcript "Q"—pages 175-177.

Entry—Judgment of Court—August 16, 1956—Transcript "Q-1"—page 178.

At the time the trial judges made their finding of fact and conclusion of law the Court of Common Pleas of Champaign County had adjourned for the summer vacation from July 24 to September 6, 1956—Transcript "R"—page 179.

The case was removed from the trial Court to the Court of Appeals again when a stay of execution was issued—Transcript "S"—page 180.

The petitioner refused to offer evidence when affidavit of prejudice was assigned for hearing on August 31, 1956, because the Chief Justice had no jurisdiction to vacate such finding even though he found bias and prejudice existed, because nothing was pending in the Commo: Pleas Court at that time, the case was all removed to the Court of Appeals.

The Ninth District Court of Appeals of Ohio was assigned to hear the case and rendered an opinion.—Tran-

script "T". That Court prepared and filed a Journal Entry—Transcript "U"—pages 181-185.

Petitioner filed a Motion to certify and appeal as of right —Transcript "V"—pages 186-187—also 220-221.

Motion to Certify overruled by Supreme Court of Ohio—Transcript "W"—page 189.

Motion of this petitioner to appeal as of right was overruled by the Supreme Court of Ohio—Transcript "X"—page 190.

Petitioner filed an application for rehearing—Transcript "Y"—pages 191-217—also 222-248.

Application for rehearing in the Supreme Court was denied on January 15, 1958—Transcript "Z"—page 249.

ARGUMENT

I.

DID THE TRIAL COURT AND THE APPELLATE COURTS INCLUDING THE SUPREME COURT OF OHIO WHICH AFFIRMS SAID JUDGMENT, DEPRIVE THE PETITIONER OF HIS CONSTITUTIONAL RIGHTS WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE 5TH AND 14TH AMENDMENT TO U. S. CONSTITUTION BY DENYING THE PETITIONER A FAIR AND IMPARTIAL TRIAL IN THEIR REFUSAL TO GRANT A CONTINUANCE AFTER THE COURT OVERRULED THE MOTION TO QUASH SERVICE OF SUMMONS?

The petitioner's constitutional claims presented in this review were set forth in his assignment of errors numbered 11, 12, 13 and 14 filed in the appeal to the Supreme Court of Ohio.

The appeal of right was based upon that portion of Section 2, Article IV of the Ohio Constitution which provides that the Supreme Court of Ohio "shall have • • • appellate jurisdiction in all cases involving questions arising under the constitution of the United States or this state • • •." Since that appeal was dismissed, the constitutional claims in the assignment of errors were denied.

A motion to certify record was also filed in the Supreme Court of Ohio. This motion was based upon that portion of Section 2, of Artile IV of the Ohio Constitution which grants jurisdiction to the Supreme Court to review judgments of Courts of Appeals in cases of "public or great general interest." This motion was denied. The petitioner filled in the Supreme Court of Ohio application for rehearing, setting forth constitutional issues raised by that decision in this case. The application was denied on January 15, 1958.

In this proceeding against a licensed attorney in the State of Ohio, the jurisdiction of the lower court, the measure of the offense and the power and rights of punishment were all dependent upon the statute, Ohio Revised Code, Section 4705.02.

The transcript and record in this case shows that the petitioner appeared specially in the trial Court and challenged the jurisdiction of the Court because venue was not properly laid. Transcript "F"—page 103.

The duly elected judge of Champaign County, Ohio assigned the case for hearing and withdrew from further consideration of said cause, requested the Chief Justice to appoint another judge to preside over the case. Transcript "D"—page 99.

The Chief Justice of the Supreme Court of Ohio made that appointment on April 7, 1955 and those who were appointed filed their authority with the Clerk of Court, Champaign County, Ohio on April 18, 1955.

Until there was a judge assigned and present in Court to hear and determine the issues in this case, this petitioner could do nothing unless he waived his right to question jurisdiction of the Court.

In the trial of every law suit there arises certain preliminary matters that should and ought to be disposed of prior to the trial of the action.

In this action, this petitioner was contesting, and still is maintaining, that the Court did not have jurisdiction because the action was not properly brought in the county where personal service could be lawfully obtained. However, be that as it may, the Court had that motion for its consideration that was filed prior to the day that the Court convened, to consider this case. The Court knew that prior to the ruling upon that motion, the petitioner was unable to file any pleading in the Court or to take any depositions of any party because in doing so, he would have waived the question that this petitioner raised regarding service. The petitioner did not then, nor at any time, intend to waive that question.

Therefore, all questions that would arise after the motion was decided, would go to the very essence of the charges made. A reading of the proceedings that took place on April 18, 1955 at about 10:45 A.M. to 11:00 A.M. show an utter and total disregard for all of the rights that are ordinarily given to litigants in Court as provided by the Constitution of this United States.

A motion was made for a continuance of the trial of this case to enable the petitioner to take depositions, which was overruled by the Court. Transcript "C"—page 26.

Again on pages 85 and 86, a Motion to take depositions was also overruled by the Court.

Disbarment is a very serious matter. In re Theard.

Disbarment deprives the petitioner of the means of earning a livelihood. This deprives the petitioner of something of great value regardless of whether the practice of law is a property right. Then, too, the loss of reputation and prestige usually accompanies such deprivation.

This Court has fully recognized the value of that right and the gravity of such a loss and has further recognized such to be within the scope of protection under the Fourteenth Amendment. *In re Summers,* 325 U. S., 561.

(a) Was the petitioner granted due process when the trial court refused to grant a continuance for the purpose of taking depositions to support the petitioner's defense in said disbarment action?

When the petitioner examined the charges, he decided that Wiliam T. Gillie, an attorney, was a necessary witness for the petitioner because he had intimate knowledge of the facts contained in Specification No. 2 and Specification No. 7.

Petitioner issued a subpoena for William T. Gillie on May 6 but he refused to obey the subpoena as issued.

This petitioner believes that he (William T. Gillie) was not required to appear under the subpoena that was issued. Mr. Gillie was a resident of Columbus, Franklin County, which does not adjoin Champaign County, Ohio.

R. C. 2317.16 reads in part as follows:

> "A witness shall not be compelled to go out of the county where he resides, or is subpoenaed except to an adjoining county, to testify in a civil action."

Since this is a civil action no one can be compelled to go outside an adjoining county to testify.

In order to get the testimony of anyone who lives outside an adjoining county, it is, therefore, necessary to take their deposition.

Section Revised Code 2319.06 reads as follows:

> "Either party may commence taking testimony by deposition at any time after service upon the defendant."

This petitioner could not have at any time after service was made upon him taken depositions prior to the time

the Court ruled on the Motion to Quash unless he would have waived service. If he had taken depositions, prior to that time, then he would have waived his right to attack the venue of the action and would have waived his right to question the jurisdiction of the Court.

If this petitioner had done anything in this case prior to the Court's ruling on the 'motion to quash', it would have been tantamount to a waiver of defective service. This petitioner never intended to waive service.

Revised Code 2319.16 provides for the service upon the adverse party and provides the time that notice must be made prior to time of taking depositions.

Revised Code 2319.16 reads as follows:

> "It also must be served as to allow the adverse party time, exclusive of Sundays, the day of service, and one day for preparation, to travel by the usual routes and modes of conveyance to the place named in the notice."

Revised Code 2319.26 reads as follows:

> "Every deposition intended to be read in evidence on the trial must be *filed* at least *one day* before the day of the trial."

When the date of April 18th was set, it became necessary for the trial Court to rule upon the motion to quash service.

The above statute shows that every deposition must be filed *one day* before the day of trial and since notices to take depositions must be served at least three days before the taking of the depositions, it necessarily follows that if any depositions were desired to be taken and filed in this case, notice to take depositions would have been required to have been given to the Committee not later than April 12, 1955.

If notice to take depositions had been given, then the question of defective service would have been waived by this petitioner.

The refusal of the trial Court to continue the trial of this action after the motion to quash was ruled upon, prevented the petitioner from taking any depositions.

The committee and the Court were well aware that the question of time from the day of service until the motion to quash was ruled upon, was in no way connected with the preparation for trial or trial date. However, they were aware that a refusal to continue the matter to enable the petitioner to take depositions would prevent the petitioner from submitting certain competent and valuable evidence to the Court.

The records show that the Petitioner was deprived of the testimony of William T. Gillie.

Certain other witnesses were necessary and proper such as mother, father and brothers of Edith Butcher who live 125 miles away. The three people who were visiting at the Rust home, involves Specification No. 4. One of whom was attending Yale University, another in the United States Army—their testimony could only have been obtained by deposition. Relatives of Leah Heck who lived outside the state of Ohio, were necessary and proper witnesses and whose testimony could be obtained only by deposition.

This petitioner was deprived of the evidence necessary for his defense by the refusal of the trial Court to continue the trial date for a short period of time to take depositions.

In the case of *U. S.* v. *Hoffman*, 24 F. Sup. at pages 847, and 848, the Court said:

> "The contention that this Court is without power to enable the defendant to secure evidence abroad by proper methods is abhorrent to American in-

stincts. "It may suit the purpose of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

"Amendment 5 to the Constitution of the United States U.S.C.A. Constitutional Amendment 5, guarantees that no person shall be deprived of his life, liberty or property without due process of law, and Amendment 6, U.S.C.A. Constitutional Amendment 6, insures a defendant's right "to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

In the case of *Strzebinski* v. *Jary*, 112 A.L.R. 391, at pg. 394, the Court said:

"Near the close of the discussion on appellee's motion for a directed verdict, counsel for the appellant again formally moved that the case be passed so that he might secure a deposition from his client through the U. S. counsel in Poland. In denying this motion, the court said that the motion came too late, for although he was willing to give appellant's counsel an opportunity to take a deposition in Poland, he was then without power to grant his motion, since the appellee had moved to direct a verdict in his favor. To this ruling, the appellant duly excepted. Stated in general terms, "judicial discretion" means sound discretion, exercised not arbitrarily or willfully, but with just regard to what is right and equitable under the circumstances and the law. *Commonwealth* v. *Gallo*, 275 Mass. 320, 175 N.E. 718, 799 L.R. 1380.

This court has repeatedly held that where a trial justice acts in the exercise of judicial discretion his decision will not be reviewed by us, unless it is made to appeal clearly that he abused this discretion in the circumstances or based his decision upon a mistake of law as to his powers. *Tillinghast* v. *Iverson*, 50 R.I. 23, 25, 144 A. 673; *Mackenzie and Shea* v. *Rhode Island Hospital Trust Co.*, 45 R. I. 407, 122 A. 774; *Comire* v. *Comire*, 43 R.I. 489, 113 A. 748.

Where a question which calls for the exercise of judicial discretion is properly presented, it is the duty

> of the court to consider and determine that question so that the rights of the parties may be fairly protected in an orderly manner. It is as much an abuse of judicial discretion in refusing to exercise such discretion when warranted by the facts before the court, as it is to exercise that discretion improperly by means of a decision that is clearly erroneous on the facts under the law."

To deprive anyone charged in a disbarment action from producing material evidence in their defense which if said accusations were found to be true would deprive the petitioner of earning a livelihood and makes him an outcast in society amounts to a violation of constitutional rights guaranteed to him by the United States Constitution under the 5th and 14th amendments.

This Court in the case of *Powell* v. *Alabama*, 287 U. S., 45, at page 59 said:

> "As the Court said in *Commonwealth* v. *O'Keefe*, 298 Pa., 169, 173; 148 Alt. 73;
>
> "it is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case."

The very purpose of granting due process under the 14th and 5th amendments is to protect the rights of the individual which includes this petitioner.

In the case of *Snyder* v. *Mass.*, 291 U. S. 96, 78 Led. 677.

> Mr. Justice Cardoza delivered opinion of the Court at page 105," What may not be taken away is notice of the charge and adequate opportunity to be heard in defense of it. *Trevining* v. *N. J.*, 211 U. S. 78, 53 Led. 97, 29 S. St. 14 Supra; *Powell* v. *Alabama*, Supra. (287 U. S. 68, 71, 77 Led. 170, 171, 53 S. Ct. 55); *Holmes* v. *Conway*, 241 U. S. 624, 60 Led. 1211, 36 S. Ct. 681. Cf. *Blackmer* v. *U. S.*, 284 U. S. 421, 440, 76 Led. 375, 384, 52 S. Ct. 252.

Since the Judges knew that they could not hear the evidence in one continuous session, they certainly could have postponed the beginning of the trial for such a reasonable time as to enable this petitioner to take the depositions of all desired witnesses.

What harm would have been done the Committee if this case had been postponed for ten days or two weeks?

At the end of three days the case was continued.

The Judges knew when they came to Urbana that they intended to recess on Wednesday, April 20, 1955.

If the Court was interested in holding a fair and impartial hearing, they would have postponed the trial date to a day certain in the future, that would have enabled this petitioner to take various depositions.

In a case found in 39 ALR 2d 1435, *Hays Appt.* v. *Viscome et al, Respts.*, 122 Cal. App. 2d 135, 264 P. 2d 172. at page 1443 it says:

> "The fact that there were other cases awaiting trial did not warrant a denial of the requested continuance. A litigant is entitled to a fair share of the Court's time, and may not be deprived of an opportunity to present his case fully and fairly because someone else is being inconvenienced by having to wait his turn. No lawyer can foresee or predict all the vicissitudes that will occur in the course of a contested trial, which often consist of unpredictable rulings of the Court. Plaintiff's attorneys were not negligent in failing to anticipate that defendant's would not call Dr. Berryman. They acted promptly and their request for a continuance was reasonable. As a matter of fact, it is stated in the plaintiff's brief and not denied by defendant's that the court was occupied with other testimony until 3:50 P.M. and at 4:05 P.M.the case was continued till Monday morning. Moreover, so far as wasting the court's time is concerned, the record shows that when the Court was adjourned shortly after 4:00 o'clock on Friday afternoon, the court stated that inasmuch as

> Tuesday was a legal holiday, there would be a Court session Monday morning but not on Monday afternoon, and the jurors were instructed that they should be prepared to return to Court, after the adjournment Monday noon, at 9:00 o'clock A.M. on Wednesday.
>
> By adjourning the case from about 3:50 P.M. on Friday until Monday morning probably a quarter of an hours time would have been lost; by adjoining the trial from Monday noon until Wednesday morning, a good half day would have been lost. Howevr, we deduce from the record that the verdict was reached on Monday. The Court stated no sound reason for denying the continuance and we can discover none.
>
> Had we been in the position of the trial judge we would have considered denial of the requested continuance to be an abuse of discretion. As a reviewing Court, our views are not different, and we cannot put them aside merely because the trial judge believed it would be an abuse of discretion to grant the continuance. We must be guided by the dictates of our own judgment and experience. And we hold that plaintiff's case was prejudiced for no good reason by denial of her request of a short continuance.

The facts in this case show an abuse of discretion of the trial court which under the law as decided by this court and other state courts, is a violation of the petitioner's constitutional rights.

(b) Was the petitioner granted due process when the trial court compelled the petitioner to trial immediately after overruling motion to quash, without giving the accused time to investigate the charges, time to prepare for trial or time to investigate the witnesses to be used by the Committee?

The petitioner requested a continuance of the trial in order to file certain written motions, subpoena witnesses, file an answer and time to prepare for trial, all of which were denied to this petitioner.

The right of the petitioner to prepare proper pleadings and have them judiciously ruled on by the Court has always been fundamental in our judicial system.

It seems to this petitioner that the rights afforded anyone charged with a felony should be also afforded to this petitioner.

In the case of *People* v. *Crump*, 52 A.L.R. 2d 834, 843, the court said:

> "It is urged that the court erred in denying the defendant Crump's motion for continuance. On May 5, 1953, defendants counsel filed motion for continuance supported by affidavit showing that counsel was engaged in the trial of a civil jury case continuously from April 7, 1953, to and including April 30, and that on that date the wife of the defendants counsel had entered the hospital where she remained until May 3, and asserting that counsel had been unable to prepare for trial from April 24 to the date of the filing of the petition. No counter affidavits were filed by the State. On May 6, the day such motion was argued, the state furnished the defendant with a list of 48 witnesses, about which the court was advised by counsel for the defendant, and that it would be necessary for him to investigate each of such witnesses.
>
> From the record it appears that counsel had represented defendant since March 27. The indictment was returned March 31, and on April 13 the case was set for trial for May 11, and at the time of the hearing on the motion the court ordered the case set for May 18, a little over 10 days from the date of hearing the motion.
>
> The record is silent as to any urgent reason for the State or the court to proceed to trial, and the state was avowedly seeking the death penalty. A motion to continue a cause, as here presented, is addressed to the discretion of the Court. *Benton* v. *Marr*, 364 Ill. 628, 5 N.E. 2d 466. However, on a charge of murder, where the prosecution is seeking the death penalty, every reasonable opportunity should be given

> the defendant to investigate witnesses against him and to prepare his defense.
>
> It is our opinion the court abused its discretion in denying the defendant adequate time to prepare his defense in this case. Ten or eleven days to investigate 48 States witnesses and to prepare for cross-examination thereof and to prepare the defense in chief in a capital case can hardly be deemed reasonable and the trial court should have continued the case to a later date."

If every reasonable opportunity should be given the defendant charged with murder to investigate witnesses against him and to prepare his defense, surely the same opportunity should be afforded the petitioner.

In the case cited the court allowed 10 days continuance but the appellate court said that was not adequate time.

In this case the petitioner was compelled to proceed immediately allowing no time to investigate 24 witnesses subpoened by the committee. The 24 persons were from 6 counties, spread over a territory of approximately 200 miles.

The Committee (Transcript "C" page 28), said "We do object to a continuance if he wants to prepare a case."

The Court will understand that if the motion to quash had been sustained, no preparation for trial was necessary, no witnesses needed to be subpoened or interviewed, no investigation of any witnesses was necessary, no trial attorneys were required.

The petitioner believes that the failure of the trial court to continue the matter was a violation of the constitutional rights of this petitioner. Many cases have held that the defendant is entitled to have his trial date continued because of lack of preparation.

Lack of Preparation—231 P. 2nd 507; 267 U. 792; 49 A. 2nd 659; 111 S.E. 411; 231 N.W. 332; 185 S.W. 511;

35 N.W. 2nd 234; 229 S.W. 428; 25 N.W. 2nd 813; 36 A. 2nd 403; 101 N.Y.S. 209; 600 L.A. 145—101 N.E. 2nd 220; 50 A. 2nd 334; 181 S.E. 357.

(c) Was the petitioner granted due process when the trial court compelled the petitioner to trial immediately after overruling the motion to quash without giving the accused time to have certain trial lawyers present who were then engaged in trial elsewhere?

The transcript shows that the petitioners attorneys who appeared on April 18, 1955 were hired only for that motion and they were not prepared for trial.

The Court was advised on April 19, (Bill of Exceptions, pg. 84) that attorneys who would represent this petitioner were engaged in trial elsewhere and could not be present at the time the court ordered the petitioner to trial.

When counsel for petitioner was engaged elsewhere, courts have held that the request of the parties to a continuance were justified in a great number of cases, some of which are as follows:

Counsel engaged elsewhere or interested party

112 A.L.R. 603.

Circumstances justifying or requiring continuance. *Waxelbaum Co.* v. *Atlantic Coast Line R. Co.* 3 Ga. App. 394, 59 S. E. 1129.

Hopkins v. *Smothers* 114 S.C. 488, 104 S.E. 30

Gerlock v. *Engelhoffer* 7 Phil. (Pa.) 241; *Hill* v. *Clark* 51 Ga. 122; *Rossett* v. *Gardner & Richardson* 3 W. Va. 531; *Bartel* v. *Tieman* 55 Ind. 438; *Tallant* v. *Whitright* 63 Mont. 76, 206 P. 347; *Harde* v. *Purdy* 115 N.Y.S. 92; *Modern Woodmen* v. *Floyd Tex* Civ. App. 218 S.W. 1085; *Blake* v. *W. Va. Ins. Co.*, 111 W. Va. 245, 161 S.E. 32; *American Soda Fountain Co.* v. *Dean Drug Co.* 136 Iowa 312, 111 N.W. 534; *Birmingham* v. *Goolsby* 227 Ala. 425, 150 So. 325.

In 48 A.L.R. 2d p. 1167 there are several cases annotated which discuss the right of a party to a continuance

because their attorney is not familiar with the facts and the law. Continuance—withdrawal of Counsel 48 A.L.R. 2d 1167.

Where in a will contest, on the day before the case was set for trial, the attorney who had represented plaintiff's withdrew from the case because plaintiff's refused to accept his recommendation of settling their claim for a certain amount, and the plaintiffs thereupon employed other counsel only thirty minutes before the time for trial, it was held in Leija Os. Concha (1931) Tex. Civ. App.) 39 S.W. 2d 948, that the trial court's refusal to grant a continuance in order to permit new counsel to acquaint themselves with the case constituted an abuse of discretion. The court said that the right to be represented by counsel is a valuable right, and in order for counsel to properly represent a client, he must have the opportunity to familiarize himself with the facts and the law of the case.

Defendant immediately after he was served with process he retained an attorney to represent him in the action, that such attorney prepared the case and pleadings, but when the case was called for trial withdrew from the case, and that defendant did not know of his attorneys intention to withdraw and therefore had no other attorney to represent him and was unable to present his own case, it was held in *Griffin* v. *Russell* (1914) 161 Ky. 471; 170 S.W. 1192, that the trial court committed reversible error in overruling the motion for continuance and in forcing the defendant into trial even though defendant thereafter succeeded in procuring a competent lawyer to represent him in the trial. The court said that it is well known that very few lawyers, however able they may be, can properly defend an important case involving complicated issues of fact and nice questions of law, upon the spur of the moment, that preparation is not only proper, but necessary for the orderly, prompt administration of justice, as well as the protection of the client's interest.

It was held in *Amo* v. *Genovese* 17 N. J. Super 109, 85 A 2d 529, certif. den. 9 N.J. 181, 87 A 2d 576, that the denial of the continuance constituted an abuse of discretion, particularly in view of the facts that the action involved the controversial issue of negligence, with claim for unliquidated damages, and the case had been at issue for only 45 days.

It was held in *Fidelity-Phenix Fire Ins. Co.* v. *Oliver* (1941) 25 Tenn. App. 114, 152 S.W. 2d 254, that the Court had abused its discretion in denying such motion, since the court had failed to continue the case a sufficient time to permit the defendant to employ other counsel to investigate the case and make a defense.

What is said above certainly is applicable in this case to enable the petitioner to have a fair and impartial trial.

Until the court had ruled upon the motion to quash the petitioner did not know that he would be required to proceed to trial in Champaign County.

How could this petitioner have a full opportunity to be heard in his own defense without having competent trial lawyers?

In re Metzenbaum, 154 P. 2d, 604:

"It is now universally recognized that the right to practice law, once acquired, is a valuable right, and that an attorney cannot be deprived of that right except by the judgment of a court of competent jurisdiction after notice and full opportunity to be heard in his own defense."

In 2 Thornton, Attorneys at Law 1301, 882, it is said:

"An attorney can be deprived of the right to practice his profession only upon a judicial hearing on charges legally presented, and in which he is given a full and fair opportunity to be heard in his own defense."

In 5 Am. Jur. 435, Attorneys at Law, 289, the decisions of the Courts are epitomized in the following statement,

> "Except where the matters constituting the ground of its action occur in open court in the presence of its judges, the power of the court to disbar or suspend an attorney should not be exercised without notice to the offending party on the grounds of complaint against him and without a hearing affording him ample opportunity of explanation and defense."

In the case of *Theard* v. *United States of America*, Supreme Court Reporter, 1274, the Supreme Court of the United States on June 17, 1957, said,

> "——Disbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred."

Ample opportunity to be heard certainly means with competent counsel when a serious matter is involved.

The court was advised that the petitioner's attorney did not have any knowledge of the facts in this case (Transcript C— pages 32 and 33).

Under broad principles of due process as outlined by this Court at various times, it would seem that the facts as disclosed by the record constituted a denial of fundamental fairness which should be given in a disbarment proceeding.

In the case of *Betts* v. *Brady*, 316 U. S. Reports 455 on page 462, the Court said:

> Due process of law is secured against invasion by the federal government by the Fifth Amendment, and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an ap-

praisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed.

In the case of *Gallagher, Appellant,* v. *Harrison, et. al., Appellees,* 86 Ohio Apeals, 73; 40 Ohio Opinions, 484, Judge Hilderbrant, speaking for the court says, on Page 496:

"Generally as to the requirements of due process, —— "* * * A hearing before judgment, *with full opportunity to present all the evidence* ——"

What the Constitution grant, no court may take away.

In the case of *Simpson* v. *Stanton,* 193 S.E., 64:

"The due process provisions of Federal and State Constitution are broad enough to embrace all character of rights whether or not they may technically be called property rights.

The due process of law, guaranteed by the State and Federal Constitution, when applied to Court procedure, requires both notice and right to be heard.

The essential elements of "due process of law" are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case."

The question of due process was discussed by the Court in case of *Curran* v. *State of Delaware,* 154 F. Supp. 27, page 30, as follows:

Where the false and evasive testimony is that of a high ranking police officer in action charge of the criminal investigation, this court cannot say the testimony was immaterial to the outcome.

The concept that the use of perjured testimony is a denial of due process received its first consideration as dicta in the celebrated case of *Mooney* vs. *Holohan*. In its percuriam opinion the Supreme Court said that the requirement of due process:

. . . in safeguarding the liberty of the citizen against deprevation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. . . . It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of the court and jury and by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the state, like that of administrative officers in the execution of its laws, may constitute state action within the preview of the 14th amendment. That the amendment governs any action of a state, 'whether through its legislature, through its courts, or through its executive or administrative officers'.

While untarnished administration of justice is one of the most cherished aspects of our governmental institutions perfection has not been achieved, and is not guaranteed by the 14th amendment. Federal due process does not assure to a defendant a trial free from false and evasive testimony. Nor is the purpose of the due process to punish misconduct of prosecuting officers or the police. On the other hand, the 14th amendment does guarantee a state shall not deprive an accused of certain fundamental rights.

The line between tolerable imperfection and fundamental unfairness in a criminal trial is not clearly discernible. It must be determined which side of the line the false and evasive testimony of detective John Rodenhiser causes this case to fall. This court is of the opinion the denial of the prior existence of the original statements by a high ranking officer in direct

contradiction to the testimony of the defendants constitutes fundamental unfairness in the trial of a criminal case.

U. S. v. *Brodson*, 241 F. 2d 107, pg. 111:

> Due process of law requires that convictions cannot be brought about by methods that offend a sense of justice. *Rochin* vs. *People of State of Cal.* 342 U.S. 165, 173, 72 S. Ct. 205, 96 L. Ed. 183. As applied to a criminal trial, denial of due process is a failure to observe the fundamental fairness essential to the very concept of justice. *Lisenba* v. *People of State of California* 314 U.S. 219, 236, 62 S. Ct., 280, 86 L. Ed. 166. The tactics of the government in this case in preventing defendant from utilizing the necessary tools of defense certainly offends my sense of justice. There were no elements of fairness present in the government's tactics.
>
> The tactics of the Government in this case also were a violation of defendant's rights under the Sixth Amendment which provides that a defendant is entitled to have the assistance of counsel for his defense. The denial of effective assistance of counsel also violates due process. *Powell* v. *State of Alabama*, 287 U.S. 45, 58, 53 S. Ct., 55, 77 L. Ed., 158. This right to the effective assistanc of counsel entitled the defendant to a reasonable opportunity to defend. In re: *Oliver*, 333 U.S. 257, 275, 68 S. Ct. 499, 92 L. Ed., 682.

The Supreme Court of the United States has many times held that any defendant is entitled to have his attorney or attorneys present at the trial.

On several occasions they have allowed a writ of Habeas Corpus when the defendant was not permitted to have adequate counsel:

Butte v. *Illinois*, 333 U.S. 640;
Gibbs v. *Burke*, 337 U.S. 773

In the case of *Glasser* vs. *United States,* 315 U.S. 60, at page 61, the court said:

> "The fact that a defendant in a criminal case is an experienced lawyer may be a factor in determining whether he waived his right to assistance of counsel; but is not conclusive.
>
> The trial Judge should protect the right of an accused to have the assistance of counsel.
>
> The right to have the assistance of counsel is too fundamental to be made to depend upon the nice calculation of Courts of the degree of prejudice arising from its denial."

In the case of *State* v. *Farrell,* 26 S.E. 2d, 322, the Court said:

> "Due process of law includes the right to counsel and its accustomed incidents of consultation with a accused and opportunity for preparation for trial and a proper defense."

There are hundreds of cases that hold that the defendant was deprived of his constitutional right to have counsel of his own choice during his trial.

This appellant nor the attorneys who appeared for him regarding the motion to quash, ever considered that they would be forced to proceed to trial immediately after said motion was disposed of.

Certainly this appellant should have been given the opportunity to have counsel of his choice present and the refusal of the trial Court to grant a continuance of a few weeks to enable them to be present, showed a lack of honesty, justice and fair play in a matter as important as this one.

Nestor v. *George, et al.,* 46 A2d, 469, on Page 472, says:

> Though the matter is not properly assigned for error, the record discloses that the trial Judge stopped plaintiff's counsel during the latter's opening address

to the Jury as he was stating what is "intended to prove." While the addresses of counsel either in "opening" or "closing" to the jury, are subject to the restraint of the trial judge, should the opening address become argumentative in character or should, either address transcent the bounds of professional decorum or be reasonably lengthy, it must be kept in mind by those who preside over our Courts that just as in criminal cases it is the constitutional right of every accused "to be heard by himself or his counsel", *so likewise in civil cases, a litigent's right to fully represented by counsel is an integral part of that "due process of law" which every resident of this state and nation whose legal rights are being adjudicated can freely invoke.* (Emphasis added.)

The failure of the trial Court to continue the trial for a reasonable time and to permit the appellant to have adequate counsel was a violation of the due process clause of the Constitution of the United States of America.

(d) Was the petitioner granted due process when the trial court compelled the petitioner to trial immediately after overruling motion to quash without giving the accused time to issue subpoenas?

The petitioner could not subpoena any witnesses prior to the courts ruling on the motion to quash which was first presented to the Court on April 18, 1955, otherwise he would have waived the right to challenge the jurisdiction of the court.

The subpoena of witnesses would have amounted to an appearance.

The court guarantees to an accused person the right to have compulsory process. However, since this action against the petitioner is a civil action. *In re Lieberman* 161 O.S. 35, compulsory process is limited to the county or adjoining counties and then only when their fees are demanded, be paid before their appearance can be required.

The transcript G-1 in this case shows that witnesses who did not live in the county where the action was pend-

ing nor in adjoining counties were subpoened but failed to honor said subpoenas.

The petitioner believes said witness had a perfect right to refuse to obey said subpoena but was thus deprived of their testimony when the trial court refused to continue the case to take depositions.

Transcript G-1 further shows that certain witnesses demanded their fees but that the return was made to the clerk's office too late to issue another subpoena or made after the court concluded the case.

In the case of *State* v. *Blount*, 44 A.L.R. 2d 711, pg. 726 also in *State* v. *Grimes, supra*, 7 Wash. at pg. 449, 35 P. at page 363, it is stated:

> "The Constitution guarantees to an accused person the right to have compulsory process to compel the attendance of witnesses in his own behalf, without the advancement of money or fees to secure this right. But it cannot be that the measure of the Constitutional requirement would be filled by the mere issuance of a subpoena by the clerk, leaving to the accused the burden of making service, and paying fees and mileage. Such a construction would be to give the shadow, and withhold the substance; and we think the Constitution can only be satisfied by the production of the witness in court without the payment of fees or mileage in advance."
>
> Speaking on this subject, that eminent jurist Chief Justice Marshall said, "The right of an accused person to the process of the court to compel attendance of witnesses seems to follow, necessarily, from the right to examine these witnesses; and, wherever the right exists, it would be reasonable that it *should be accompanied by means of rendering it effected.* (Emphasis Mine) —— The genius and character of our laws and usages are friendly, not to condemnation at all events, but to a fair and impartial trial; and they, consequently, allow to the accused the right of preparing the means to secure such a trial. —— The constitution and laws of the U. S. will now be con-

sidered for the purpose of ascertaining how they bear upon the question.

The sixth amendment to the constitution gives to the accused, in all criminal prosecutions a right to a speedy and public trial, and to compulsory process for obtaining witnesses in his favor. "The right, given by this article must be deemed sacred by the courts, and the article must be so construed as to be something more than a dead letter. 1 Burrs Trial 178-179."

The failure to make effective the right and opportunity to have all witnesses present either in person or by deposition was a denial to the petitioner of his constitutional rights.

Any witness that could assist the Court in determining the truth of the charges should have been required to appear either in person or by deposition.

The failure to permit the petitioner the opportunity to secure their testimony by deposition or in person did not conform to our ideas of fair play, justice and right.

II.

DID THE TRIAL COURT AND THE APPELLATE COURTS INCLUDING THE SUPREME COURT OF OHIO WHICH AFFIRMED SAID JUDGMENT DEPRIVE THE PETITIONER OF HIS CONSTITUTIONAL RIGHTS WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE 5TH AND 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION BY DENYING SAID PETITIONER'S PROCEDURAL DUE PROCESS?

(a) Was the petitioner granted due process when the trial court consisted of three judges when the Ohio Constitution provides for only one?

Article IV, Section 3 of the Constitution of Ohio provides in part:

"*One-resident judge* of the court of common pleas, and such additional resident judge or judges as may be provided by law, shall be elected in each county of the State by the electors of such county;

Revised code 2301.02—number of judges for each county and date term of office begins—says:

> "Champaign, one judge, in 1952, term to begin January 1, 1953."

The statute definitely provides only one judge in Champaign County.

Now let's turn our attention to when a three judge court may act.

Revised code 2315.21—Trial in civil actions by three judge court; power and membership of court—provides in part:

> "In any civil action wherein a *trial by jury* has been waived the parties may *file a request* with the trial Court for a trial before a court of three judges. If the request is granted by the trial judge the cause shall be so tried, and if the request is not granted the cause shall proceed to trial before the trial judge." (Emphasis added.)

It would therefore seem that before a three Judge Court could act the parties must *file a request* and the trial court grant such a request.

In addition to *filing a request*, it would be necessary to show that a *trial by jury* has been waived, before a court of three judges could sit.

In the first place, the petitioner was not entitled to a trial by jury in *Re Hawke* 107 OS. 349, and in the second place, the petitioner never filed a request with the trial court for a court of three judges.

There must be some statutory or Constitutional provision before three foreign judges could sit in a trial, either in a civil or a criminal action.

In this case, the Chief Justice attempted to increase the membership of the Court of Common Pleas of Champaign

County to a greater number than is provided by the legislature of Ohio.

The Chief Justice of the Supreme Cour of Ohio only has whatever power the statute or Constitution grants to him. There is no constitutional or statutory provision giving the Chief Justice of the Supreme Court of Ohio the right to increase the number of judges in any county over those provided by the legislature of the State of Ohio.

When the trial judge says he is disqualified to sit, the authority of the Chief Justice to assign a Judge is limited, to the statutory authority of the number of Judges composing the trial Court as set out by statue.

In this case the number is *one*.

The Chief Justice attempted to and did assign three judges. We believe that such procedure is illegal and unlawful. It is without any authority and therefore void.

This is a question that goes directly to a competent tribunal. In the case of *Scott* v. *McNeal*, et al., 154 U.S. 34 at page 46:

> Mr. Justice Gray held, No judgement of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.
> The words "due process of law" when applied to judicial proceedings as was said by Mr. Justice Field, speaking for this court, "Means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is by the law of its creation to pass upon the subject matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance. *Pennoyer* v. *Neff*, 95 U. S. 714, 733.

Procedural due process is just as important under the Constitution as any other process. The Constitution requires a fair and impartial tribunal.

This Court in case of *Chessman* v. *Teets, Warden,* 354 U.S. 156, held

(a) Petitioner was entitled to be represented either in person or by counsel throughout the proceedings for the settlement of the trial record.

(b) Petitioner's refusal to be represented by counsel at the trial did not constitute a waiver of his right to counsel at the settlement proceedings.

(d) Consistently with procedural due process, the State Supreme Court's affirmance of petition's conviction upon a seriously disputed record, whose accuracy petitioner had no voice in determining cannot be allowed to stand.

In Champaign County, Ohio, a single judge must preside.

In the case of *Curry* v. *McCaffery,* 47 Mont. 191, 131, p. 673:

> *"Jurisdiction of a cause cannot be in two judges at the same time when the cause is in a court over which a single judge presides."*

In the case of *Griffin* v. *Griffin,* 90 L. ed. 635, 327 U.S. 270 at p. 228, the court speaking through Chief Justice Stone said:

> Mr. Chief Justice Stone held that " a judgment in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction."

Under the facts as shown by the record, we believe the petitioner was denied due process of law.

(b) Was the petitioner granted due process when he was required to defend said action in Champaign County, Ohio two hundred miles from his home, especially since service of summons was not made on him in Champaign County?

The petitioner's motion to quash was overruled by the trial court. Venue in this case was in Cuyahoga County not in Champaign County.

Where action is to determine personal rights and obligations of defendants it is an action IN PERSONAM. 60 A. 2nd 809.

It is well settled that the practice of law is *not a property right.* It is *a personal right.*

It is a very personal right, a privilege granted to the individual. Once admitted it is the absolute right of the attorney to maintain his professional position against anything less than a judgment of exclusion.

It would therefore seem from the examination of the various cases cited, that this is a civil statutory proceeding and in personam.

Since any attorney can practice in all of the eighty-eight counties of the State of Ohio, the question arises: Is an attorney required to defend himself against disbarment proceedings in any county where personal service has not been made upon him?

Revised code 4705.02 in part reads as follows::

> "Judges of such state courts are required to cause proceedings to be instituted against an attorney, when in comes to the knowledge of any judge or when brought to his knowledge by the bar association of the county in which such attorney practices that he may be guilty of any of the causes for suspension, removal, or reprimand."

Revised code 4705.03 in part reads as follows:

> "Before an attorney at law is suspended or removed, or publicly or privately reprimanded, written charges

must be filed against him, stating distinctly the grounds of complaint, and a copy thereof, certified by the clerk, under the seal of the court, served upon him."

The statutes say *"served upon him."* Revised Code, 2307.02.

"There shall be but one form of action, to be known as a civil action." This action does not affect any substantive right or liability, legal or equitable."

Since the Supreme Court of Ohio, has held that a disbarment proceeding is a statutory action and a civil action, it now becomes necessary to determine from the statutes, *the venue* in a disbarment proceeding. In other words, where must the complaint certified by the clerk be served upon such attorney?

R.C. 2307.39:

"All actions, other than those mentioned in sections 2307.32 to 2307.38, inclusive, of the Revised Code must be brought in the county in which a defendant resides or may be summoned, except actions against an executor, administrator, guardian, or trustee, which may be brought in the county wherein he was appointed or resides, in which cases summons may issue to any county."

The venue in a disbarment proceeding must be in the last section. Either where the *attorney lives* or can be *personally served.*

The record shows that this petitioner was not served in Champaign County, that he was served by the Sheriff in Cuyahoga County, the county where this petitioner, J. Harvey Crow, resided.

Tuerman v. *Chicago M. & St. P. R. Co.,* 46 A.L.R. 563

To assume jurisdiction over a person against his protest where no jurisdiction exists is a denial of due process of law.

When the Court does not have jurisdiction that amounts to the violation of procedural due process. This Court has said in *U.S. et al* v. *Corrick et al.,* 298 U.S. 435, at page 440:

> The appellants did not raise the question of jurisprudence at the hearing below. But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, and the district court should, therefore, have declined sua spoute, to proceed in the cause. And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties made no contention concerning it. While the District Court lacked jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit. The decree must, therefore, be reversed and the cause remanded with directions to dismiss the bill.

The Judge cannot establish venue of an action, by ordering certain lawyers to file charges against attorneys outside his jurisdiction.

Loftus vs. *Pennsylvania Railroad Company,* 107 O.S. 352. Chief Justice Marshall said:

> "Courts of general jurisdiction will entertain action against any person upon whom service of process can be made in accordance with statutory procedure."

The statutory provisions in this case take it out of Champaign County, Ohio.

The statutes determine where and how service shall be made.

This petitioner believes that venue was not proper and the petitioner was denied the benefits afforded him by the Constitution.

(c) Was the petitioner granted due process when he was required to present his case to the Supreme Court of Ohio with Chief Justice sitting on the bench after he was requested to withdraw since his action appointing three judges to hear the case was challenged by said petitioner?

One of the questions that was raised in the Supreme Court of Ohio was the right of the Chief Justice to increase the size of the court of Champaign County from one judge to three.

When this petitioner presented his motion to certify and appeal as of right to the Supreme Court, the Chief Justice was requested to remove himself from the consideration of this case, which he refused to do.

To permit the Chief Justice to sit under the facts in this case was not proper.

Our judicial processes never intended that anyone be permitted to pass upon his own acts.

12 Amer. Jur. Sec. 746. *In re: Murchison,* 99 L. ed. 942.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent ever the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered.
>
> This court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge — not to hold the balance nice, clear and true between the states and the accused, denies the latter due process of law." *Tumey* v. *Ohio,* 273 U.S. 510, 532, 71 Led. 749, 758, 47 S. Ct. 437, 50 A.L.R. 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who do their very best to weigh the scales. But to perform its high function in the best way "justice must satisfy the appearance of justice."

Offutt v. *U.S.*, 348 U.S. 11, 99 L. ed. 11, 75 S. Ct. 11.

> Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.
>
> The right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such way. We hold that it was a violation of due process for the "judges grand jury" to try these petitioners, and it was therefore error for the Supreme Court of Mich. to uphold the Convictions. The judgments are reversed and the causes remanded for proceedings not inconsistent with this opinion.

With Chief Justice Weygandt sitting on the bench, we believe that the due process clause was violated when petitioner presented his appeal to the Supreme Court of Ohio.

III.

DID THE TRIAL COURT BY PROCEEDING TO ENTER JUDGMENT AGAINST THIS PETITIONER, AND THE APPELLATE COURTS INCLUDING THE SUPREME COURT OF OHIO WHICH AFFIRMED SAID JUDGMENT, DEPRIVE THE PETITIONER OF HIS CONSTITUTIONAL RIGHTS WITHOUT DUE PROCESS OF LAW IN VIOLATON OF THE 5TH AND 14TH AMENDMENTS TO U. S. CONSTITUTION BY DENYING SAID PETITIONER A HEARING BEFORE A FAIR AND IMPARTIAL TRIBUNAL AFTER AN AFFIDAVIT OF PREJUDICE WAS FILED AND BEFORE THE SAME WAS HEARD AS PROVIDED BY LAWS OF OHIO?

Revised Code of Ohio 2701.03 provides in part:

> "When a judge of the court of common pleas — has a bias or prejudice either for or against, a party to such matter or cause or to his counsel, or is otherwise disqualified to sit in such cause or matter, on the filing of an affidavit by any party to such cause or matter, or by the counsel of any party, setting forth the fact of such interest, bias, prejudice, or disqualification, the clerk of the court of common pleas shall enter the fact of such filing on the trial docket in such cause and forthwith notify the chief justice of the supreme court. The chief justice shall designate and assign some other judge to take the place of the judge against whom such affidavit is

filed. The judge so assigned shall try such matter or cause Such affidavit shall be filed not less than three days prior to the time set for the hearing in such matter or cause."

The Court ruled that this petitioner must proceed to trial as soon as they overruled the Motion to Quash.

It was physically impossible to file an affidavit three (3) days before the trial date as set forth in the statute.

Had the petitioner filed such an affidavit, he would have entered his appearance and thereby consented to the jurisdiction of the court, which this petitioner did not intend to do.

The petitioner intended to protect his rights by standing on the Motion and not consenting to the jurisdiction because of improper venue.

The first opportunity to file such affidavit was after the reversal by the Court of Appeals.

The Court of Appeals Entry was filed April 7, 1956—Transcript "O" (pp. 165-166) and on the same day said Affidavit of Prejudice was filed—Transcript "P" (pp. 167-174).

That affidavit was assigned for hearing on April 26, 1956, however prior to hearing, the case was appealed by the Committee to the Supreme Court of Ohio and the Affidavit hearing date was postponed.

It was later reassigned by the Honorable Chief Justice Carl V. Weygandt for August 31, 1956.

However, prior to said date, the trial judges to-wit on August 16, 1956 met and made a finding of fact and conclusion of law and placed on an Entry of Disbarment.

To make such a finding it was necessary that they perform a judicial act.

If after a full and fair hearing on the Affidavit of prejudice, the Chief Justice would have found them to be

disqualified, surely no one would then maintain those judges so disqualified had any jurisdiction. Then it would be conceded by everyone that, if the Judges had no jurisdiction any judgment by them would be void.

A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S., 133.

The Affidavit of this petitioner—Transcript "O" (pp. 167-174) as filed consists of 15 different specifications.

In the case of *Tucker* vs. *Kerner*, 23 A.L.R. 2d, 1027 at page 1029, the Court said:

> "Plaintiff is entitled to a fair and impartial trial of this cause; denial of a fair and impartial trial is a denial of the due process of law, guaranteed by the constitution of the State of Ill. and of the United States;
>
> Ill. Constitution Art. 2.
>
> 2 U. S. Constitution 15 Amendment; *Whitaker* v. *McLean*, 73 App. D.C. 259, 118 F. 2d, 596; *Mitchell* v. *U. S.*, (CA 10th N.M.(126 F. 2d 550, 552; *People ex rel. Little* v. *St. Louis Merchants Bridge Co.*, 282 Ill. 408, 413, 118 N.E. 733."

The entry of disqualification put on record by Judge Case in Fayette County and Green County, Ohio, shews said Judge to be disqualified to act as a fair and impartial Judge, in a case involving this petitioner. (Application for Extension of Time—Exhibit "D"—subsecton "S.")

12 Amer. Jur., 329, Section 635 says:

> "A fair trial, as required by due process, requires not only an absence of actual bias on the part of the judge, but also that no man be a judge in his own case, or try cases where he has an interest in the outcome, and every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

We believe the trial Judges lost jurisdiction to proceed with any consideration of the case upon the filing of the affidavit, prior to the hearing of such affidavit.

Chief Justice Carl V. Weygandt in case of *Austin* vs. *Shaffer*, Case No. 139 in the Court of Appeals, Champaign County, Ohio, on November 4, 1955, said:

> " — — I will say that the law is that the *filing of an affidavit of bias and prejudice stops everything cold* and it doesn't make any difference whether the affidavit is filed timely, or whether it is wrong or whether it isn't so, but that stops everything; and that nothing can proceed until there has been a hearing on that affidavit of bias and prejudice.
> *The statute is mandatory.* It has been held that when an affidavit is filed that the Clerk of Courts must furnish a certified copy of that affidavit to the Chief Justice and that nothing can move in that case until that affidavit has been disposed of one way or the other."

This statute states it must be filed not less than three days prior to the time set for hearing in such cause or matter.

Wolf v. *Marshall*, 120 O.S. 216, holds that where an affidavit of prejudice was filed at the earliest moment when counsel knew who the trial judge was to be and before the beginning of the trial it is the duty of the trial Judge to be governed by the affidavit of prejudice so filed in all respects as if it had been filed at least three days prior to the day of trial and to disregard such affidavit of prejudice and proceed with the trial constitutes prejudicial error.

The trial Judges never gave the Chief Justice of the Supreme Court of Ohio a chance to act on said bias and prejudice affidavit, but proceeded to make a judicial finding of fact and conclusion of law on August 16, 1956, before a hearing was scheduled by the Chief Justice.

In order to prepare the finding of fact and conclusion of law filed August 16, 1956, they had to perform a judicial act.

In the case of *State, ex rel. Pratt* v. *Weygandt, Chief Justice,* 164 O.S. 463, 58 O.O., 315, Syllabus 4 reads as follows:

> "The term, 'biased or prejudiced,' when used in reference to a judge before whom a case is pending, implies a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts."

In the *Pratt case, supra,* Judge Zimmerman on page 319 of O.O., said:

> "However, in concluding, we think it not inappropriate to quote the following language from the opinion in the case of *Haslam* v. *Morrison, Judge,* 113 Utah, 14, 20, 190 P. (2d), 520, 523:
>
> 'The purity and integrity of the judicial process ought to be protected against any taint of suspicion to the end that the public and litigants may have the highest confidence in the integrity and fairness of the courts. This is not to say that the mere filing of an affidavit of bias and prejudice, ipso facto casts such suspicion on the Judge, and upon his integrity and fairness, that he ought to disqualify himself. However, it is ordinarily better for a judge to disqualify himself even though he may be entirely free of bias and prejudice if either litigant files an affidavit of bias and prejudice.
>
> 'Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness or integrity of the judge'."

It would therefore seem to follow that the findings of fact and conclusion of law and the judgment made on August 16, 1956 while said affidavit of bias and prejudice was pending and prior to being heard, was a nullity and a violation of due process clause.

In the case of *State of Missouri ex rel. Frank W. McAllister, Attorney General* v. *John G. Slate, Judge of the Circuit Court of Cole County,* 8 A.L.R. 1227 says:

> "(6) If a judge becomes prejudiced in a case, the cause of the prejudice, and whether it is warranted or not, are immaterial upon the question of his qualification to sit.
>
> (8) A trial judge may lose jurisdiction of a criminal case because of a prejudice against the state.
>
> (11) Prejudice by the trial judge against the state is within a statute providing that the judge shall be deemed incompetent to hear and decide the case when he is in any wise interested or prejudiced.

The above case holds that if the trial judge becomes biased at any time he should not be allowed to participate.

In the past two years, Judge Case and Judge Kirk disqualified themselves from sitting in any case in which this petitioner represented a client.

If the trial Judges could not sit and be fair and unbiased when this attorney represented a client, pray tell us how they could constitute a fair and impartial tribunal when the petitioner was the defendant?

In any judicial determination as important as this one, the Court should proceed cautiously and deliberately. It should obey the statutes and its actions should conform to the law.

What was said in *Florida case* could be repeated here.

State of Florida, ex rel. C. A. Brown, et al. v. *Robert T. Dewell, Judge of the Criminal Court, Florida Supreme* (in Banc) 115 A.L.R. at page 868:

> "It was stated that 'every litigant, including the state in a criminal case, is entitled to nothing less than the cold neutrality of an impartial judge', in *State ex rel. Mickle* v. *Rowe,* (1930) 100 Fla. 1382, 131 So. 331," ——.

A Federal Court in *Myers et al.* v. *Shields, County Treasurer,* (Circuit Court, Northern District, E. D.) Volume 61, Federal Reporter at page 725 said:

> "—— our system of judicial proceedings assures to each party a fair and disinterested judge, and jury to pass upon the law and facts in controversy between them."

The Supreme Court of Montana in a case entitled *In re Woodside,* 194 P. 2nd 241, held:

> "The policy of the judicial system is that no judge should be allowed to sit when he is laboring under bias or prejudice toward one or more of the parties litigant." Rev. Code 1935, 8868, subd. 4.

Chief Justice Adair said in that case,

> "The disqualification of a judge cannot be waived if it is grounded in public policy or is based on an absolute constitutional or statutory prohibition against a disqualified judge sitting in the case."

What was the reason for the hurry demonstrated by the trial Court in proceeding to make their finding after the affidavit was filed and prior to the hearing as provided by statute?

The hearing on the affidavit was scheduled for August 31, 1956—only 15 days away. Surely it was not a matter of life and death.

This Court has always maintained that due process is conditioned upon a fair trial before a disinterested tribunal.

We believe that the facts as shown from the transcript and the records in this case indicate that the tribunal was biased and that the Constitutional rights of this petitioner were violated.

(a) Did the trial court afford the petitioner procedural due process by entering judgment on August 16, 1956 when the court of Common Pleas was adjourned?

The trial Judges could not wait until after the Affidavit of Bias and Prejudice could be heard as provided by law, they came to Champaign County, Ohio on August 16, 1956 when the Court was in adjournment—Transcript "R" (p. 179) and made a finding of fact and conclusion of law, which was nothing more than a reiteration of the charges filed by the committee—Transcript "Q" (pp. 175-177).

They also prepared and filed an Entry of Disbarment—Transcript "Q-1" (p. 178).

The Court of Common Pleas was adjourned until September 6, 1956—Transcript "R" (p. 179).

What jurisdiction did the trial Judges have during adjournment?

If they had waited until after the Affidavit of Bias and Prejudice was heard which was set for August 31, 1956 then they would not have been able to act, for the evidence would have been overwhelming against the trial Judges.

Had the Trial Judges waited for the term to open, then it would have been too late to act because they would have been removed or prevented from acting.

Any fair and impartial Judge would or could not make a finding as these Judges did.

On page 260 of Bill of Exceptions, Edith Butcher said she was honest "up to a point"—Transcript "C" (p. 94). She said "I don't know" over 130 times on cross-examination about things she testified to on direct examination.

The Ohio Constitution provides as follows:

Article IV—Section 18 Powers and jurisdiction:

"The several judges of the supreme court, of the common pleas, and of such other courts as may be created, shall, respectively, have and exercise such

power and jurisdiction, at chambers, or otherwise, as may be directed by law."

Revised Code 2301.05, 2301.06 and 2301.09 provide for terms of court and special terms.

The Court adjourned court as shown by certified copy of an entry filed July 24, 1956, from July 24, 1956 to September 6, 1956. Transcript "R" (p. 179).

Here we have Judge Case, Judge Kirk and Judge Dull coming from other counties at a time the Court of Common Pleas is adjourned and preparing a finding of fact and conclusion of law; preparing and placing an entry on record in this case, filing precipe so the entry will be sent to the Supreme Court of Ohio, Chief Justice of Ohio and various district courts in Ohio and elsewhere.

They do this while Court is on vacation.

It would seem that they have no right, authority or power to act in this case while said Court is in vacation.

14 Ohio Jurisprudence 2nd, Section 94, page 510 says:

"—— The test of jurisdiction is the court's power to act at all, not the correctness of its decision in so acting."

Also at page 512, says:

"On the other hand, if it proceeded without jurisdiction, it is equally unimportant how technically correct and precisely certain, in point of form, its record may appear; its judgment is void to every intent, and for every purpose, and must be so declared by every court in which it is presented. When the record discloses a want of jurisdiction, the judgment is void everywhere and for every purpose."

Chief Justice Marshall in 108 O.S., 126 at page 133, said:

"The Court is a tribunal organized for the purpose of administering justice, while the judge is the officer who presides over that tribunal.

> The term "court" and "judges" are sometimes used interchangeably and anonymously, but they are never technically the same in meaning.
>
> *It is only when a court is in session thus regularly constituted that it may lawfully perform its fixed and permanent functions, and it is in this sense that the term "court of common pleas" is used in Section 1707, General Code.*—Now R.C. 4705.02. (Emphasis added)

The acts of these Judges did not involve an emergency.

Corpus Juris Secundum has analyzed this question as found in 21 Corpus Juris Secundum, Section 167 at page 257; Vacations and Proceedings Therein

> "Under the construction of some statutes, as well as at common law, vacation is limited to the period between terms; but, as used in other statutes, it includes a recess extending over one or more judicial days. The transaction of judicial business in vacation is not permissible unless authorized by constitutional or valid statutory provisions; and, except where it is provided otherwise by constitution or statute, such business cannot be transacted then even though the parties consent."

The general rule is that all judicial business should be transacted by a Court in term time.

Some decisions from other jurisdictions are as follows:

Natis vs. *Jackson,* 38 S.E. 2d 925, 1949, the Supreme Court of Mississippi held:

> "In cases taken under advisement at Court term for purposes of rendering judgment and delivering opinions in vacation, 'vacation' means period between end of one term and beginning of next term, and judgment rendered after next succeeding term without entry of order at such term to decide case in vacation is void."

Entry of Court out of term is void. *Union Motor Car Company* vs. *Cartlege,* 133 Miss. 318, 97 So. 801.

The Supreme Court of Illinois, 81 Ill. 103, in the case of *Bruce* vs. *Doolittle,* says:

> "Upon a careful examination of the evidence, we are satisfied that the facts found by the Court were fully authorized by the testimony and that the order entered was proper.
>
> But after the Court had heard the evidence, the Court adjourned for the term, and the Judgment of the Court was entered in vacation.
>
> The rendition of the judgment in vacation was error, for which the judgment must be reversed and the cause remanded."

Again in the case of *Citizens State Bank of Frost* vs. *Miller County Judge, et al.,* 115 S. W. 2nd 1183, the syllabus as found in the case read as follows:

> "A court must transact all judicial business in term time, except as specially authorized by constitutional or valid statutory provisions.
> Orders of County Court entered after expiration of the regular term —— were void."

What would be the purpose of adjournment of Court if outside Judges could come into the County and exercise any authority?

What is the purpose of the statutes in providing for terms, or additional terms if it means nothing?

We believe that the law in Ohio and elsewhere is well founded that the Court cannot act while it is in vacation.

At the time the judgment in this case was entered, this Court had adjourned until September 6, 1956.

It follows that such judgment entered is void and a nullity. That there is no valid judgment.

The action of the trial Judges violated procedural due process also prevented this petitioner from having a fair and impartial tribunal to make the finding of fact and conclusion of law as required by the Court of Appeals.

CONCLUSION

If this decision of the Trial Court and affirmed by the appellate court including the Supreme Court of Ohio stands, it will be a direct violation of the Petitioner's Constitutional Rights to a fair and impartial trial by a fair and impartial Court.

In the State of Ohio there is no trial by jury in a disbarment proceeding. Had there been one, there would have been an acquittal.

When the trial Court refused this Petitioner time to take depositions, said Petitioner was deprived of material and substantial evidence.

The failure of the Trial Court to continue the trial of this case after ruling upon the motion to quash deprived the petitioner of the fundamental right to an orderly and fair trial after the accused is determined to have been legally and lawfully in Court.

If the Court had sustained the petitioner's Motion, then no preparation for trial was necessary, no witnesses need have been subpoenaed, no trial lawyers need to have been present, no witnesses needed to have been investigated, no depositions were necessary to be taken.

The petitioner could not take depositions, subpoena witnesses, file an affidavit of prejudice or otherwise make an appearance in Court, without waiving his right to challenge the jurisdiction of the Court over his person.

The petitioner was deprived of his fundamental right to a fair and impartial trial by the trial Court and the refusal of the trial Court to continue the trial of the case for a few

weeks shocks our sense of right, justice and fair play, thereby depriving the petitioner of his constitutional rights under the 5th and 14th amendments.

The petitioner was not only deprived of his constitutional rights directly but was also deprived of procedural due process as has been set forth in this Petition and Brief.

Unless this Court intervenes, the petitioner has no recourse from the despotic action of the trial Court in denying this petitioner due process of law.

Respectfully submitted,

REED M. WINEGARDNER
J. HARVEY CROW
Attorneys for Petitioner.

APPENDIX

IN THE

COURT OF APPEALS OF CHAMPAIGN COUNTY, OHIO

IN THE MATTER OF THE DISBARMENT PROCEEDINGS AGAINST J. HARVEY CROW

No. 138

135 N. E. 2nd, 281

Opinion

Rendered on the 5th day of August, 1955

BY THE COURT:

Submitted on motion of the Committee in these proceedings for an order vacating the stay of execution of order of disbarment entered by this court on May 23, 1955. The motion asserts that this court was without jurisdiction to make the order for five reasons:

(a) The application was not made in the proper Court;

(b) The motion was not in writing;

(c) Notice of the time and place of the hearing on the application was not given to the committees;

(d) Terms were not prescribed by the court under which said alleged stay was to be effective;

(e) Said order does not set forth the findings of fact and conclusions of law which constitutes the good cause recited therein.

The Committee on behalf of the motion cites R.C. 4705.04

"In case of suspension or removal of an attorney at law by the court of common pleas, an appeal on ques-

tions of law may be had to the court of appeals, and the sentence of either the court of common pleas or the court of appeals may be reviewed on appeal on questions of law in the supreme court. *If such suspended or removed attorney shall desire a modification of the decree of suspension or removal, he shall file a written motion therefor in the court which entered such decree.*"

That part of the section contained in the last sentence thereof is underscored by the Committee.

In our judgment, the underscored portion of the section has no application whatever to proceedings on appeal which are specifically authorized by the first sentence of the section. The right of appeal has been recognized in every reported case of review of orders disbarring attorney's at law, and, in this court orders have been without exception stayed pending disposition of the appeal upon the giving of a supersedeas bond.

The proceeding under review is a civil action as to which the right of supersedeas on appeal on questions of law has full application.

To require appellants who desire to give supersedeas bonds to show good cause before suspension of execution of orders is impractical because it probably would necessitate an examination of the records upon which the orders were predicated which would not then be available.

That part of the section which the Committee underscores has application only when, and if, it has been determined that there is a valid, subsisting judgment. The provision may be invoked by motion at any time during the period of the disbarment order and is directed to the court which made the order. Here, it is the contention of the appellant that there is no valid order of disbarment which question may be properly raised on his appeal.

In the matter of John A. King, 54 O.S. 417, cited by the Committee, is confirmatory of our view of the controlling

statute and in no sense raises any question of the right of the appellant here to prosecute his appeal under the appeal statutes and under the specific provision of Section 4705.04 R.C.

The motion will be overruled.

Miller, P. J., Hornbeck and Wiseman, JJ., concur.

Filed Aug. 6, 1955

O. R. Outram,
Clerk of Court of Appeals,
Champaign County, Ohio.

IN THE
COURT OF APPEALS, CHAMPAIGN COUNTY, OHIO

IN THE MATTER OF THE DISBARMENT OF J. HARVEY CROW

No. 138

73 O.L.A. 421

Opinion

Rendered on the 17th day of December, 1955

APPEARANCES:

REED M. WINEGARDNER, Washington C.H., Ohio, and J. HARVEY CROW, 528 Cuyahoga Savings Building, Cleveland, Ohio, In Propria Persona
Attorneys for Appellant

RICHARD P. FAULKNER, Urbana, Ohio
EDWIN L. ENGLISH, Urbana, Ohio
RUSSELL B. HOLDING, Urbana, Ohio
D. H. JACKSON, London, Ohio
Attorneys at Law
The Committee

Filed December 19, 1955
O. R. OUTRAM,
Clerk of Court,
Champaign County, Ohio

Griffith, J.

On February 5, 1955, charges were preferred against J. Harvey Crow in the Common Pleas Court of Champaign County, which charges were prepared by four attorneys

theretofore appointed by the Common Pleas Judge as a committee to investigate and, if there is probable cause, to submit and persecute the same. Three members of the committee were from Champaign County, and the fourth was from the neighboring County of Madison.

The complaint was for misconduct and unprofessional conduct in office involving moral turpitude and was supported by 11 specifications. On February 14th, a copy of these charges, certified by the Clerk, was served upon appellant at his office at 1409 N.B.C. Building, Cleveland, Ohio, by registered mail; also on February 14, 1955, the Sheriff of Cuyahoga County served J. Harvey Crow by personally handing to him a true and certified copy of the charges for disbarment.

On February 23rd, the case was assigned for trial by order entered on the journal. Time fixed was April 18, 1955. Appellant was notified of the date fixed. On April 16th, appellant filed the following motion:

> "Now comes J. Harvey Crow for the purpose of this motion, and for no other purpose and not intending to submit to the jurisdiction of this court and without submitting himself to the jurisdiction of this court; and not intending to enter an appearance in this cause be appearing especially for this motion, moves the court to set aside the summons issued herein against him, and to quash the service of summons made on him and the return of the Sheriff thereon for the following reasons.
>
> "1. That the venue of said action is not in Champaign County.
>
> "2. That the legal residence of said J. Harvey Crow at the time of filing said petition was and now is in Cuyahoga County, Ohio.
>
> "3. That said J. Harvey Crow maintained an office for the practice of law and at the time of filing petition did and for a long time prior thereto did maintain an office in Cuyahoga County, Ohio for the practice of law.

"4. That service of summons was made upon said J. Harvey Crow at his office, 1409 N.B.C. Building, Cleveland, Ohio by the sheriff of Cuyahoga County, Ohio.

"5. That this is an action in personam and personal service is necessary.

"6. That said action must be maintained in the county that personal service can be made.

"7. That no personal service was made in Champaign County, Ohio

"8. That the venue of said action is in Cuyahoga County, Ohio.

"9. That the statutes of Ohio do not provide for service in a foreign county in this action.

"That said motion will be heard upon Affidavits hereto attached to said motion and others that might be filed with the permission of said court."

J. HARVEY CROW,
REED M. WINEGARDNER,
Attorneys for J. Harvey Crow.

At the time of the filing of the motion, appellant filed affidavits and brief. The affidavit of the clerk of the Board of Elections of Cuyahoga County was to the effect that the appellant was an elector of Cuyahoga County of February 5, 1955.

The affidavit of Max E. Gustin, an attorney at Cuyahoga County, was to the effect that the appellant has offices at 1409 N.B.C. Building and has had the same for ten years past, and the affidavit of the appellant himself was to the effect that for a long period of time prior to February 5, 1955, he had been a resident and voter of Cuyahoga County.

The Committee prepared a brief and filed it on Monday Morning, April 18th and also filed affidavits of the Common Pleas Judge, and the Prosecuting Attorney, and the Probate Judge of Champaign County, the substance of which

affidavits was to the effect that the appellant is presently practicing law in Champaign County and has numerous cases pending in each court.

When the Court covened at 9:30 A.M. on April 18th, appellant did not appear but was represented by Attorneys Reed M. Winegardner and Frank L. Nevius, who argued the motion to quash.

After consideration thereof, the Court overruled this motion. Motion then was made for a continuance, and the same was overruled. Numerous motions were made by counsel for the appellant testing the preliminary matters of jurisdiction, venue and service, continuances of trial, etc.

On Tuesday morning, April 19th, the appellant appeared in person at the trial and demurred to the first specification which, after consideration thereof, was sustained by the Court, but various motions were overruled.

Trial was carried on during April 19th and 20th, then adjourned to May 9th; it then carried through May 13th and, at the close of that day, the Court found the appellant guilty on specifications 2, part of 4, all of 5 and 7, announcing its decision at about 5:00 P.M. of that day.

In this appeal, there are 34 errors assigned, the first of which reads:

> "The court erred in overruling the motion filed by J. Harvey Crow to quash the service of summons made upon the said J. Harvey Crow he having appeared especially for said motion."

The motion goes to the matter of venue. It asserts that the venue of this action is not in Champaign County since the appellant, at the time of the filing of the charges, was a resident of Cuyahoga County and practicing law there.

Venue means the county in which the action is brought for trial. This proceeding is brought pursuant to *Section 4705.02 O. R. C.*, which reads:

> "The supreme court, court of appeals, or court of common pleas may suspend or remove an attorney at law from office or may give private or public reprimand to him as the nature of the offense may warrant, for misconduct or unprofessional conduct in office involving moral turpitude, or the conviction of a crime involving moral turpitude. Such suspension or removal in all the courts of the state. The Clerk of court upon such suspension or removal shall send a copy thereof to the supreme court, the court of appeals, and to the federal court of the district in which said attorney resided at the time of trial for such action as is warranted. Judges of such state courts are required to cause proceedings to be instituted against an attorney, when it comes to the knowledge of any judge or when brought to his knowledge by the bar association of the county in which such attorney practices that he may be guilty of any of the causes for suspension, removal or reprimand."

While the statute does not state where the proceedings shall be filed, we do know, from a reading of the record, that the actions of misconduct alleged occurred in Champaign County, that the appellant of February 5, 1955 was a resident of Cuyahoga County and, further that he was on that date a practicing attorney in Champaign County representing clients having numerous cases pending in the Courts of that county.

We find and hold that the proper place of the trial of this case was in Champaign County. There was no error on the part of the Trial Court in holding that the venue of this action laid in Champaign County.

The second error assigned reads:

> "That the Trial Court erred in holding that it had jurisdiction in this action."

Did the Trial Court have power or authority to hear and determine this cause? In the *Lieberman Case, 163 O.S. 35,* Syllabus 1 reads;

> "A proceeding to suspend or remove an attorney at law from office is strictly statutory and constitutes an action at law only, and the only appeal provided in such proceeding is one on questions of law."

Section 4705.03 O.R.C. requires personal service. The record discloses that a copy of the written charges filed against the appellant, stating the ground of complaint, was served upon him at or about the time the same were filed.

Appellant contends that this being a civil action in personam, Section 2307.30 O.R.C. applies. Appellant was not served in Champaign County, but was served by the Sheriff of Cuyahoga County, the county where he resides. Service was had upon him, but he is complaining because it was made on him in Cuyahoga County instead of Champaign County.

The practice of law is state wide in its operation. Appellant was an officer of the Court of Champaign County, had practiced there for years and is still practicing there, and the service on him was sufficient, the venue properly laid in Champaign County, and the Court had complete jurisdiction over both the person and the subject matter.

We find no merit to the first three assignments of error.

Coming now to the court assignment of error which reads:

> "That the Court erred in failing to comply with the motion to make a separate finding of fact and conclusion of law filed by the appellant."

The trial Court announced its decision by May 13th at about 5 P.M. by the reading of the journal entry which the Court prepared. The Clerk of Courts Office was then closed. On May 14th at 8:10 o'clock A.M., this journal was filed in the Clerk's Office. At 10:40 A.M. of the same day, the appellant filed his written motion for separate findings of fact and conclusions of law, as provided by *Section*

2315.22 O.R.C. At 11:25 o'clock of the same day, the appellant filed notice of appeal which reads as follows:

> "Now comes J. Harvey Crow and hereby gives notice of appeal to the Court of Appeals for the Second District of Ohio from the judgment rendered by the Court of Common Pleas in the above entitled action on the 14th day of May, 1955. This appeal is on questions of law. J. Harvey Crow."

The partial bill of exceptions before this Court failed to reveal any action by the Trial Court on this motion, and there are no separate findings in the record. Failure of the Court to make the requested findings equates its refusal so to do. The filing of the notice of appeal is not inconsistent with the filing of a request for findings since the request is with a view of excepting to the Court's decision upon questions of law involved in the trial.

Section 2315.22 O.R.C. is mandatory. In the case of *Levick* v. *Bonnell*, 137 O.S. 453, the Court held that the application was timely filed when it was filed the day following that of the judgement entry when it was filed without being submitted to opposing counsel. True, the court prepared this journal, and not counsel, but that fact has no bearing on the rights of this appellant.

This Court, in the case of *Weikert* v. *Weikert*, 68 O.L.A. 257 has held that where a case is tried to the Court upon request of either party, the Court shall state in writing its conclusions of law and findings of fact; that this statute (Section 2315.22) O.R.C. confers a substantial right, and it is mandatory upon the Court to comply with such requests, and the failure to do so constitutes prejudicial error unless it appears from the record that the party making the request is not prejudiced thereby.

We hold that the application for findings was timely filed, and the filing of the notice of appeal did not operate as a waiver of the appellant's right to such findings, and the failure to make such findings constitutes prejudicial error.

A re-trial of this case is not necessary. The case is reversed and remanded to the Trial Court with directions to make findings of facts and conclusions of law and re-enter such judgment, as the case may require, as of the date the findings are filed in the Clerk's office.

This is not a general remand for diminution of the record, but is a remand for the Trial Court to make its findings of fact and conclusions of law and goes not further back than to the point where this error was committed, to-wit: failure of the Trial Court to make and journalize the conclusions of fact found separately from the conclusions of law. We are not passing on the other errors assigned. The rights of the parties to appeal, after such findings have been made and filed, are preserved.

Judgement reversed. Case remanded to the Court of Common Pleas for further proceedings in accordance with this opinion. Costs to abide final judgement.

Griffith, J. Seventh District, sitting by Special Assignment.

Fess, J. Sixth District, and Nichols, Seventh District sitting by Special Assignment, concur.

IN THE

COURT OF APPEALS, SECOND JUDICIAL DISTRICT
CHAMPAIGN COUNTY, STATE OF OHIO

IN THE MATTER OF DISBARMENT PROCEEDINGS AGAINST
J. HARVEY CROW.

J. HARVEY CROW, *Appellant.*

v.

RICHARD P. FAULKNER, RUSSELL B. HOLDING, EDWIN L. ENGLISH, AND D. H. JACKMAN, *as Disbarment Committee, Appellees.*

No. 145

Opinion

Argued April 26, 1957. Decided May 8, 1957.

APPEAL ON QUESTIONS OF LAW

STANLEY DENLINGER, REED M. WINEGARDNER, AND J. HARVEY CROW, *for Appellant.*

RICHARD P. FAULKNER, RUSSELL B. HOLDING, EDWIN L. ENGLISH, AND D. H. JACKMAN, *for Appellees.*

PER CURIAM:

This matter comes into this court as an appeal on questions of law from the judgment of disbarment entered in the Court of Common Pleas of Champaign County, Ohio.

The matter was fully presented before three visiting judges, sitting by assignment as the Common Pleas Court of Champaign County, Ohio.

We have carefully read and considered the record in its entirety, as well as the thirty-nine errors assigned as basis for the reversal of the judgment.

As to none of the errors specified do we find reversible error to be shown by this record, nor do we find the judgment to be manifestly against the weight of the evidence.

It is the unanimous conclusion of the members of this court that the judgment under review should be affirmed, and it is so ordered.

Affirmed.

HUNSICKER, P. J., DOYLE, J., AND STEVENS, J., *concur*.

(Judges of the Ninth District sitting by designation in the Second District.)

No. 1007

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

J. HARVEY CROW,

Petitioner,

vs.

RICHARD P. FAULKNER ET AL., AS DISBARMENT COMMITTEE,

Respondent.

BRIEF OF RESPONDENT DISBARMENT COMMITTEE TO PETITION FOR WRIT OF CERTIORARI

RICHARD P. FAULKNER,
Urbana, Ohio,
D. HARLAND JACKMAN,
London, Ohio,
EDWIN L. ENGLISH,
Urbana, Ohio,
RUSSELL B. HOLDING,
Urbana, Ohio,
Disbarment Committee.

REED M. WINEGARDNER,
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J. HARVEY CROW,
Urbana, Ohio,
Attorneys for Petitioner.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

J. HARVEY CROW,

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vs.

RICHARD P. FAULKNER ET AL., AS DISBARMENT COMMITTEE,

Respondent.

BRIEF OF RESPONDENT DISBARMENT COMMITTEE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

This Disbarment Committee is somewhat at a loss in this petition of writ of certiorari, as Mr. J. Harvey Crow, petitioner, continually refers to matters he says appear in his "Application for extension of time", which Mr. Crow did *not* furnish to this Committee.

At the outset let us say this was Mr. Crow's second disbarment. He was first disbarred by the Stark County Common Pleas Court in 1935. He was reinstated in 1949 and again disbarred in Champaign County in 1955.

This Committee does not believe that there is any matter requiring review by this court or that petitioner is specially setting up any title, right, privilege or immunity claimed under the Constitution or statutes of the United States.

All of the matters raised here were raised by Mr. Crow time and again before the Ohio courts including the Supreme Court. None of them were found to have any merit. Most of the matters have been decided many times and for many years in Ohio.

The only question not before determined was the filing of an affidavit of prejudice against the trial court a year after the trial was over. The statutes in Ohio are clear that such affidavits must be filed before trial or at the earliest opportunity during trial. Notwithstanding this irregularity the Chief Justice of the Supreme Court granted him a hearing, at which he refused to offer any evidence, and the affidavit was therefore dismissed. The question then became moot.

As far as the facts are concerned this action in disbarment was commenced in Champaign County under authority of the statutes which state any judge of any state court is required to cause proceedings to be instituted when it comes to his knowledge that any attorney may be guilty of any of the causes for disbarment.

The charges were filed February 5, 1955, by the Disbarment Committee, based mainly on previous investigations of the Champaign County Bar Association Grievance Committee. Crow was served personally with notice on February 14, 1955, and also by registered mail. The cause was set for *trial* on April 18, 1955, by journal entry dated February 23, 1955, of which Crow was immediately notified

in writing and by personal telephone call from the judge of the Common Pleas Court. This gave him more than 2 months to prepare for trial. The local judge disqualified himself and 3 judges were appointed from widely scattered counties by the Chief Justice of the Supreme Court to hear the cause.

He elected to wait until April 16, the Saturday before the Monday on which trial was to begin to file his motion to quash service of summons. This motion was overruled on Monday and Crow was ordered to trial. Crow not only had resided in Champaign County for a number of years, until shortly before the disbarment action was filed, but still had an office in Champaign County (Urbana) at that time and was then engaged in a number of cases in the county courts.

Crow interposed many motions and objections, all of which were ruled on by the court.

Two of the matters on which he now relies are (1) he was not granted a continuance to bring in additional counsel; (2) he was not granted a continuance for depositions.

As to (1), he made no showing to the court as to the identity of additional counsel, and produced no statement to the court from any such attorney. He was represented by 2 attorneys.

As to (2), he had 2 months to obtain depositions if he wanted them. It is also interesting to note that the trial was adjourned for a period of 18 days during which time he took no depositions.

Crow states in his petition that "he had hundreds of clients and was opposed by numerous lawyers without complaint." The charges could not have been made up if there had not been complaints. He further states that many lawyers said his conduct was honorable and proper. He

produced *not a single one* at trial to testify as to his general reputation as a lawyer, although he subpoenaed 46 witnesses including several Common Pleas Court and Appellate Court judges.

The practice of law is a privilege, not a right. The practitioners are required to maintain certain high standards of ethical conduct. The real question involved is, did or did not J. Harvey Crow do the acts charged as a reason for his disbarment? The Ohio courts found that he did, and disbarred him.

The questions will be considered in detail.

ARGUMENT

QUESTION No. I (a), (b) AND (c)

The substance of the whole matter is that petitioner claims the trial court erred in not granting a continuance at petitioner's request. In support of this claimed error he recites that the visiting judges assignment was filed April 18, 1955; that a motion to quash "service of summons" had been filed; he desired to take depositions; file a demurrer, a motion to strike and to make definite and certain; also that "certain counsel" were not available on April 18 or 19; accused was in Cleveland, 200 miles away, and to give time for preparation of a written answer.

The record and transcript shows that specifications were filed February 5, 1955; that notice of the filing and a copy of the charges were served personally on petitioner on the fourteenth day of February; the cause was assigned for trial on April 18, 1957; notice of the trial assignment being given to petitioner on the twenty-first day of February, 1955; that he did nothing until April 16, 1955, when the motion to quash was filed.

The Committee first observes that a "summons" was not served upon accused. The paper served was a copy of the written charges, certified by the clerk of courts as required by R. C. 4705.03.

This section provides:

> "Before an attorney-at-law is suspended or removed, or publicly or privately reprimanded, written charges must be filed against him, stating distinctly the grounds of complaint, and a copy thereof, certified by the clerk, under the seal of the court, served upon him. After such service, such attorney shall be allowed a reasonable time to collect and present testimony in his own defense, and he shall be heard by himself or counsel."

Although this does not constitute the service of a "summons", it is probably included within the term "process":

> "A notice may be designated as a process where it is given by authority of law for the purpose of acquiring jurisdiction of the defendant." 72 *C. J. S.*, p. 982, Sec. 1.

Accused complains that the judges filed their assignments to sit in the disbarment case on Monday, April 18, 1955. However that may be, the Champaign County Court of Common Pleas was open for business during the usual times from February 5, 1955, to April 18, 1955, and accused could have filed any proper pleadings or motion with the clerk of that court during that time. It appears that more than sixty days elapsed between the date when the charges were served upon the accused and the time assigned for trial. The statute referred to above provides that the interval between service and trial shall be reasonable:

> "After such service, such attorney shall be allowed a reasonable time to collect and present testimony in his own defense * * *"

From a reading of petitioner's brief one would gather that he made no effort to "collect testimony" during the more than sixty days but decided to rely on his motion which he hoped by late filing (Saturday preceding trial date) would compel the Committee to ask for a continuance. Instead the Committee prepared a memorandum which was filed Monday morning and the matter was submitted immediately to the court which overruled the motion and ordered the cause to trial as assigned more than sixty days before.

Petitioner gives as a reason why his motion to continue should be sustained the filing of the assignment made by the Chief Justice. We believe these assignments are

usually made by letter and not by formal order. We assume the letters are filed as a matter of proof in order to be paid the additional compensation provided in R. C. 141.07. The Chief Justice seems to act under authority of R. C. 2701.03 although in this case the resident judge disqualified himself. We believe this could not possibly be used as a proper ground for a continuance.

The other items, taking depositions, demurrers, motions to strike, make definite and certain, file an answer and attach interrogatories seem to fall within a pattern whereby accused is attempting to apply the Chapter on pleadings, R. C. 2309.01, et seq., to a disbarment proceedings. This comes about from his failure to properly read the holding in the *Lieberman* case (163 O. S., 35) and particularly at page 42 of the opinion where Judge Bell states:

> "This court has held that a disbarment proceeding is not a chancery case. In re Hawke, supra. Nor is it a criminal proceeding. It is a purely statutory proceeding, neither civil nor criminal, instituted by order of the court to safeguard the courts and to protect the public from the misconduct of those who are licensed to practice law."

In this case it is clearly stated that disbarment is "neither civil nor criminal". The only reason for this discussion was to establish the rule as to the weight of the evidence required to disbar. We believe, therefore, that none of the provisions as to answer, motions, etc., are applicable.

Petitioner states that he was unable to take depositions prior to the ruling on his motion to quash as this would constitute an entry of his appearance in the case. He maintains this position although the statute, R. C. 4705.03, requires a reasonable time "to collect and present testimony". A reasonably prudent attorney would have filed the motion forthwith after service of the copy of the

charges. There appears to have been no right to take depositions in law actions under common law practice:

> "At common law the right to depositions in law actions was unknown in the absence of consent, although equity courts have long had power to procure testimony in this manner." 26 A. *C. J. S.*, 289, Sec. 3.

The statutes in Ohio are not very clear as to who has a right to take a deposition. They are completely silent as to use in disbarment actions. Testimony by deposition is allowed (R. C. 2319.01) but can only be used in certain instances (R. C. 2319.05). The time when the taking of depositions can be commenced is fixed by R. C. 2319.06, as "after service upon the defendant." Notice is required to the adverse party (R. C. 2319.15). It can be served upon the adverse party, his agent or attorney (R. C. 2319.16) and it is required to be filed at least one day before the day of trial (R. C. 2319.26).

There appears to be no requirement that any papers or pleadings be filed in court in regard to the taking of depositions and the party can at least withhold the filing until one day previous to trial so that it would seem that the mere giving of notice and the taking of a deposition would not be such an entry of appearance on the merits as to cut off his right to specially challenge the service. Further, the same statute that authorizes the testimony of witnesses by depositions also authorizes testimony by affidavit and there were affidavits annexed to his motion to quash so that, if the taking of a deposition would constitute an appearance on the merits, then the filing of affidavits ought to have the same effect.

Further, there is not found in the record any place where petitioner informed the court as to the names and identity of the persons whose testimony he wanted by deposition, nor is there a statement as to the probable

testimony to be elicited. Several are named in his instant brief but in the one case (Mr. Gillie), the court records were in evidence. In the others, Mr. Shank's son, the father and mother of Mrs. Butcher, and her brother, no word has ever been stated as to what their probable testimony would be, nor did petitioner make any effort to get them into court. Petitioner did not apply to the court for any order to compel any witness to appear, thus the trial court never had the chance to pass on the question. It is very probable that the court would have held that in a disbarment action, because of its state-wide nature, witnesses could be subpoenaed from any place within the state. Failing that, an adjournment would have been made and an order entered to take the depositions upon assurance that the testimony would be germane. The court was not given the opportunity.

Petitioner complains that a continuance was not granted on his statement that "certain counsel were not available on April 18 or 19, 1955, being engaged in trial of other cases." The name of such counsel was not disclosed to the court. The cases in which such counsel were engaged were not identified and there is no record that any counsel claiming to represent petitioner contacted the court either by phone, letter or messenger, requesting a continuance. The further fact remains that petitioner was represented by two able attorneys on April 18, 1955, and that one of these, Reed M. Wingardner, remained at the trial table during the whole eight days of the trial. Since then, Stanley Denlinger of Akron, has appeared in court for him. Each of these must have been of his own choice as the Committee is not aware of any requests being made by petitioner for appointment of counsel to defend him.

The alleged fact that petitioner chose to stay in Cleveland, some 200 miles from Urbana, was not any cause for continuance. It was his own choice. There were no emergencies except those he created himself.

QUESTION No. I (d)

Petitioner claims that he was denied certain rights and not afforded the opportunity by the trial court to prepare and properly present the issues involved and that this amounts to a violation of his constitutional rights under the due process clause. The action complained of was commenced February 5, 1955, in the Common Pleas Court of Champaign County, Ohio, with the filing of specifications. Due notice of the filing of same was served upon petitioner in the following manner: petitioner was served personally and by registered mail on February 14, 1955, with notice of the filing of the specifications and with copies of the specifications themselves. On February 21, 1955, petitioner was notified by Judge Owen by letter and telephone call, of the trial date.

The cause was assigned for trial on April 18, 1955, before a court composed of three visiting judges assigned by the Chief Justice of the Ohio Supreme Court. The notice served on petitioner stated the cause was assigned *for trial* on April 18, 1955, and it seems fair to assume the petitioner, as a prudent person, would consider the possibility of an adverse ruling upon his motion to quash and be prepared for trial at that time. Exactly 63 days elapsed between the time the notice was served upon petitioner and the trial, and 56 days between the notice of the trial date and the trial itself.

It appears to the Committee that the various matters complained of by petitioner arise not because of a disre-

gard of his fundamental rights to a fair and impartial trial and denial of an opportunity to present all of the facts but rather to a failure on the part of petitioner to properly use the interim to dispose of preliminary matters.

The statement is made that a continuance was denied him for the purpose of permitting "certain lawyers" to participate in the hearings and to represent the petitioner. The record discloses that petitioner was represented by two attorneys when the trial began. If other counsel were desired and unavailable at the time, no disclosure was ever made of their names or a statement over their signatures made as to their unavailability.

Petitioner complains that he was forced to proceed to trial without the opportunity of taking depositions. Section 2319.05 and succeeding sections of the Ohio Revised Code prescribe the manner and conditions under which same may be taken. The necessity for any such action was peculiarly within the knowledge of petitioner and his failure to avail himself thereof does not constitute a disregard to his fundamental rights but rather a failure on his part to properly prepare his defense. The trial adjourned from April 20 to May 9, a period of 18 days, during which petitioner made no attempt to secure any depositions.

The same statement can be made with regard to the allegations:

1. That petitioner was not given time to prepare and file a written demurrer.

2. That he was not given time to prepare and file a written motion to make the specifications definite and certain.

3. That he was required to proceed to trial without being given time to prepare and file a written answer. (No answer is required under the statutes on disbarment.)

4. That he was required to proceed to trial without being given the right or granted permission to make oral motions. (The record shows appellant made some 18 oral motions.)

5. That he was required to proceed to trial without time to subpoena witnesses. (46 witnesses were subpoenaed by petitioner.)

Even the fact that petitioner proceeded to trial on April 19, 1955, with only two hours of sleep might have been avoided had petitioner been properly prepared. This could have been accomplished by his giving consideration to the possibility of an adverse ruling on the motion to quash and, having had previous experience in matters of disbarment, this should have occurred to the petitioner.

Petitioner discusses due process, constitutional rights and his claim that he was denied a fair and impartial trial. The fact remains, however, that he did have 64 days to prepare his defense prior to trial; that he did have counsel of his own choice, at least three in number, and that this matter has, to date, occupied the attention of 19 judges.

In the opinion of this Committee, the courts before whom this case has come, have shown petitioner every consideration. The trial was fairly conducted and the yardsticks used have been very long. We must not, however, overlook the object which the courts have in view in cases of this type, which is to remove from the profession persons whose misconduct has proved them unfit to be entrusted with the duties and responsibilities belonging to the office of an attorney. Punishment is not the purpose of disbarment. Disbarment is for the protection of the courts and the public. If petitioner had, through the years, regarded the practice of law more as a high privilege, it would not now be necessary for him to attempt to assert the violation of so many rights.

QUESTION No. II (a)

In this question petitioner takes the position that he should have been tried by only one judge instead of three, although in what particular this would be detrimental to his interests he makes no attempt to assert. He cites R. C. 2315.21 as to trial in civil actions by a three-judge court which respondent does not see has any bearing upon the present disbarment proceeding since it involves civil actions wherein trial by jury has been waived.

As has been previously pointed out in the case *In re Lieberman*, the Supreme Court has distinctly stated that disbarment proceedings are purely statutory and neither civil nor criminal. A disbarment proceeding is not tried to a jury but only to the court. Disbarment proceedings have been heard in the past by various numbers of judges from one judge to at least six. *In re Quimby*, 18 O. App., 142, at page 144 the Court of Appeals notes:

> "In respect to the weight of the evidence, it appears that the cause was tried by five judges in the Court of Common Pleas who presided throughout the trial and concurred in the judgment. This court would naturally hesitate to reverse in such case upon the weight of the evidence."

In re Burch, 73 O. App., 97 at page 100, the court notes:

> "After a very full hearing before a court composed of six common pleas judges, a judgment of disbarment was entered against Burch."

We note also that petitioner raised no objection to the composition of the court before or during trial.

The question of the propriety of a court of three judges sitting in a case has been raised and determined heretofore. In the case of *State ex rel. Crotty v. Zangerle*, 64 O. App., 511, decided by the Court of Appeals for Cuyahoga

County, the specific question of the legal authority of any judge other than the trial judge to participate in the hearing was raised. On page 514 the court states:

> "There appears to be no express inhibition contained either in the statutes or the rules of the court preventing more than one judge from sitting in any matter to be considered by the court. Common practice lends the sanction of custom to common pleas judges sitting en banc in the consideration of matters of importance and we hold that the designation by the acting Chief Justice of three judges to hear the matter under consideration violated no constitutional, statutory or regular provision * * *"

At page 515 the court states:

> "We must recall that, while there is no statutory authorization, except in first degree murder cases and in certain special proceedings, for more than one judge to sit in a hearing of a matter to be considered by the Court of Common Pleas, there is likewise no statutory inhibition against such procedure."

Section 3 of Article IV of the Ohio Constitution provides, in part, as follows:

> "One resident judge of the court of common pleas, and such additional resident judge or judges as may be provided by law, shall be elected in each county of the state by the electors of such county; and as many courts or sessions of the court of common pleas as are necessary may be held at the same time in any county. *Any judge of the court of common pleas may temporarily preside and hold court in any county.*"

This matter was decided by the Supreme Court of Ohio in the case of *State ex rel. Hawke v. LeBlond*, 108 O. St., 126. In this case, after relator Hawke had been disbarred by a court of three judges of the Common Pleas Court of Hamilton County and on the theory that the judgment entered by the three judges of the Court of Common Pleas

was a nullity, relator thereafter appeared as a counsellor in the Common Pleas Court and tendered his services as an attorney and counsellor in a cause therein pending, and respondent LeBlond, as one of the judges of that court, refused to permit him to appear as an officer of the court and the action designated above was filed to compel respondent to permit the relator to act and serve as an attorney at law.

In considering all of the points that could arise, including power of the Chief Justice to appoint a commission of several judges in a county having only one common pleas judge, the court stated at page 134:

> "If we should sustain the contentions of relator in the instant case, by the same token it would have to be held that all of the permanent orders and judgments entered in all of the counties of the state where more than one common pleas judge has held office during the past twenty-five years were absolutely null and void."
>
> "Parties to litigation have no control or voice in determining the number of common pleas judges who may preside over sessions of the court, that matter being within the unlimited discretion of the judges of each county respectively."

At page 135 the court says:

> "The legislature has never prescribed in minute detail all of the procedure necessary in conducting courts of justice in an orderly manner, and many things must necessarily be left to the sound discretion of the court, and it is of course desirable that as far as possible those details be carried out in an orderly manner and according to a published rule. The implied powers of a court in this respect present a striking analogy to the implied powers of legislative bodies * * * if we should paraphrase the able and far-famed declaration concerning implied powers in that case, and apply the same to the implied and inherent powers of the courts, the following result would be attained. Let the ends be legitimate, let them be within the scope of the ex-

press powers conferred by the Constitution and statutes, and any means which are appropriate, and which are plainly adapted to that end, and which are not prohibited, but consistent with the letter and spirit of the Constitution and statutes, are lawful."

At page 136 the court says:

"We have therefore reached the conclusion that three judges had jurisdiction to hear and determine the controversy in the matter and at the time and place the same was heard."

The only possible point of distinction raised by petitioner is that in Champaign County only *one* judge is elected.

Petitioner's contention would apparently be that in no county at any time, can more judges in number than the number *elected*, hold court.

This is an obvious fallacy. The statutes provide for 3 judges in some instances, in cases where jury is waived and 3 judges requested.

It is a common practice in counties where press of business requires it, to have additional judges assigned in to handle cases. In such situations there may be several more judges in number, holding court, than the *number* elected in the county.

The Article of the Constitution cited, specifies the number to be *elected*, not the number that may hold court; and specifically goes on to say that *any* judge of the Court of Common Pleas may temporarily preside and hold court in *any* county.

QUESTION No. II (b)

Petitioner concedes that the trial court has jurisdiction of the subject matter. We interpret that to mean in disbarment proceedings generally.

He denies that:

(a) The particular action was properly brought in Champaign County.

(b) That notice could be lawfully served upon him in Cuyahoga County.

It will be noted that no complaint is made as to the manner of service or the sufficiency of the notice. We therefore assume that he has waived any matters of this kind by his later general appearance in the cause. See 32 *O. Jur.*, p. 512, Sec. 111; *part*

> "Objections to a defective summons, or service of summons, as well as to an entire failure of service or absence of summons, is cured by a general appearance on the part of the defendant; and the entry of a technical appearance is not necessary to that result."

It seems therefore that a solution to the problem will be found only by examining the special statutes applicable to a disbarment proceeding.

These are found in Chapter 4705 of the Revised Code which deals with attorneys.

Section 4705.01 provides in part:

> "No person shall be permitted to practice as an attorney and counselor at law, * * * unless he has been admitted to the bar by order of the Supreme Court in compliance with its prescribed and published rules. Admission to the bar shall entitle such person to practice before any court or administrative tribunal without further qualifications or license * * *"

The Supreme Court has adopted rules regulating these matters and these are found in 157 O. S., pages XLIII through LXXII.

The Chapter on attorneys further provides for the suspension or removal of an attorney as follows:

R. C. 4705.02 in part:

> "The Supreme Court, Court of Appeals, or Court of Common Pleas may suspend or remove an attorney at law from office * * * for misconduct or unprofessional conduct in office involving moral turpitude, * * * Such * * * removal shall operate as a * * * removal in all the courts of the State. * * * Judges of such state courts are *required* to cause proceedings to be instituted against an attorney when it comes to the knowledge of any judge or when brought to his knowledge by the bar association of the county in which such attorney *practices* that he may be guilty of any of the causes for suspension, removal or reprimand." (Emphasis added)

It will be seen that the judge is under a mandatory duty (required) to cause proceedings to be brought when either of two things occur, e.g. (1) Acts come to his knowledge, or (2) When brought to his knowledge by the bar association of the county in which such attorney practices.

This statute does not state where the proceedings shall be filed but appellees believe that instructions to a judge to do a certain act mean that the thing must be done in his own court. Judges are required by statute (R. C. 2701.04) to reside within their respective jurisdictions. The Chief Justice can assign a judge to another jurisdiction (R. C. 2701.03) but it appears that otherwise his powers and duties are confined to his jurisdiction. R. C. 2301.02 provides for the number of judges for each county, and other sections appertaining to common pleas judges, their manner of election, etc. (R. C. 3513.05). All indicate that the

official acts of a common pleas judge are confined to his own county jurisdiction, except when sitting by assignment. See *Corp. Jur.* 2nd, 48 P., 1022, Sec. 58.

We conclude therefore, that knowledge coming to the attention of a common pleas judge requires that he "cause proceedings to be instituted against an attorney" in his own jurisdiction.

Since a judge is prohibited (R. C. 4705.01) from practicing law and the bringing of proceedings in his court would undoubtedly constitute the practice of law, the time-honored custom is to appoint one or more lawyers for the purpose, and R. C. 4705.05 recognizes this procedure:

> "The court in which charges or written motion is filed in accordance with sections 4705.03 and 4705.04 of the Revised Code, shall allow to the persons *appointed* to file and prosecute the charges, or to resist the modification of any decrees, for their services in either case, a reasonable sum, not exceeding one hundred dollars, to each person, together with the costs and expenses incurred by him in such proceedings. The amounts allowed shall be paid from the *county treasury of the county wherein such proceedings are had*, upon the warrant of the county auditor. If such charges or motion is filed in the Supreme Court, such allowances shall be paid from the state treasury." (Emphasis added)

Chapter 4705 further provides in R. C. 4705.03 for proceedings against an attorney:

> "Before an attorney at law is suspended or removed, or publicly or privately reprimanded, *written charges must be filed against him*, stating distinctly the grounds of complaint, and a copy thereof, certified by the clerk, under the seal of the court, served upon him. After such service, such attorney shall be allowed a reasonable time to collect and present testimony in his own defense, and he shall be heard by himself or counsel." (Emphasis added)

Thus a disbarment proceeding partakes somewhat of the character of a criminal prosecution in that charges are preferred and a defense is required. However, the Supreme Court in *State ex rel. Joseph v. Crossland,* 152 O. S., 199, finds that the proceeding is not one to be tried pursuant to the Criminal Code.

Since all inherent rights of courts to disbar or suspend attorneys from the practice of law have been removed by statute, the courts must follow the statute: *In re Linthicum,* 32 O. L. R., 253, Annotated following R. C. 4705.03.

We conclude therefore that the action was properly filed in Champaign County.

Petitioner is not complaining about a lack of personal service. He is complaining because it was made on him in Cuyahoga County instead of Champaign. We think had the action been filed in Cuyahoga on delicts occurring in Champaign that he would be arguing on the other side and insisting that the cause was not filed where it arose and therefore the Cuyahoga County courts were without jurisdiction.

If such arguments prevailed disciplinary actions against attorneys would be impossible. Acts could be committed in 87 counties in which they did not reside and as long as they ducked personal service in the 87 counties they would be perfectly safe. We do not believe that the legislature intended any such silly construction of its enactments.

They give us the key. An attorney is admitted to practice before any court or administrative tribunal without further qualifications (R. C. 4705.01). Traditionally an attorney is an officer of the court and if he chooses to practice in 88 counties he chooses to submit himself to the disciplinary measures of their several courts. It discredits understanding to suggest that one may identify himself as an officer of a court, claim its assistance and benefit, but

deny its right to make orders or give notices affecting him.

The statute providing for notice (R. C. 4705.03) recites "and a copy thereof, certified by the clerk, under the seal of the court, served upon him". We note that it is not a summons nor is it a subpoena. It is at most a *notice* that the charges have been filed.

We think the courts and statute law clearly distinguish between *summons* which must be served in certain specified ways and the giving of *notice* which can often be according to the method determined by the court. Notices as such are not limited to the county jurisdiction. See removal of fiduciaries, R. C. 2109.24, which provides for ten days notice without stating the manner in which it is to be served; service of notice, R. C. 2101.25. Removal of assignee or trustee for benefit of creditors (R. C. 1313.07) which is silent as to any notice being required but probably requires notice under R. C. 2109.24. In the probate of a will notices are required for "residents of the state who would be entitled to inherit". R. C. 2107.13. These are commonly served by the sheriffs of other counties. Apparently the power to appoint a receiver (R. C. 2735.01) implies the power to discharge him and this may be done at chambers. *Cincinnati S. & C. R. Co. v. Sloan*, 31 O. St., 1. The receivership statutes do not provide for any notice but the courts commonly order notice unless goods are perishable, etc. See annotation 208 following R. C. 2735.01, Page's Ohio Revised Code.

However, we are concerned with the construction of R. C. 4705.03 providing for service of the written charges upon the attorney against whom such have been filed. We believe that a fair construction requires that we examine other sections in the same chapter. R. C. 4705.01 states that admission to the bar shall entitle such person to practice before any court or administrative tribunal. That

certainly implies that the courts may be in any county in the state. R. C. 4705.03 fixes the jurisdiction in suspension or removal cases in the Supreme Court, Court of Appeals or Common Pleas Court and states that such suspension or removal shall operate in all the courts of the state. If then the admission is state wide, and the judgment of removal is state wide, a statute providing for notice in such cases must of necessity have state-wide application. Further, there is no question about the Supreme Court having state-wide jurisdiction in matters of original jurisdiction. Should we then so construe R. C. 4705.03 that it has state-wide application if the action is brought in the Supreme Court, but only district wide or county wide if brought in the lower courts when the judgment has state-wide application in any of the three courts? We think the answer is obvious and that the notice was lawfully served in Cuyahoga County.

If there is any question about disbarment coming under the provisions of the chapter on civil actions it should be settled by R. C. 2307.01 which defines action.

> "An action is an ordinary proceeding in a court of justice, involving process, pleadings, and ending in a judgment or decree, by which a *party prosecutes another for the redress of a legal wrong, enforcement of a legal right, or the punishment of a public offense.*" (Emphasis added)

Another section in this chapter provides for the title of actions. R. C. 2307.03.

> "In *every* civil action the party complaining shall be known as the 'plaintiff' and the adverse party as the defendant. The title of a cause shall not be changed in any of its stages." (Emphasis added)

Even a casual reading of these sections indicated that a disbarment proceeding is not included. In disbarment one

party does not prosecute another for the redress of a legal wrong, neither does one party seek enforcement of a legal right against another; certainly there is no attempt to punish for a public offense.

The title of a disbarment action has always been "In the matter of" and the action is for the purpose of determining the continuing fitness of the attorney to be known as an officer of the court. The primary purpose of the action is to protect the court and public from the ministrations of one, who because of moral unfitness, has forfeited a right to the court's confidence and has lost thereby his usefulness as an officer of the court. That it may operate as a punishment of the delinquent is incidental only. *In re Thatcher*, 190 Fed., 659.

QUESTION No. III

Petitioner's Question No. III contends that the trial judges erred in proceeding further, after an affidavit of bias and prejudice had been filed against them, prior to the time said affidavit was heard.

The trial in the matter of the disbarment of J. Harvey Crow commenced on April 18, 1955, and was carried on through April 18, 19, 20 and then adjourned to May 9, 1955, at which time it was carried on through May 9, 10, 11, 12 and 13, 1955, when an order of disbarment was made by the court and entered as of that date. Thereafter the matter was carried to the Court of Appeals, which found that the petitioner was entitled to separate findings of fact and conclusions of law. The order of disbarment was vacated and the matter remanded to the Common Pleas Court which was directed to make findings of fact and conclusions of law, and to re-enter such judgment as the case might

require. It was after this order of the Court of Appeals was made that the affidavit of prejudice in question was filed by Mr. Crow.

Section 2701.03 of the Ohio Revised Code, which deals with the filing of an affidavit of bias or prejudice, provided, in the last sentence thereof:

> "* * * such affidavit shall be filed not less than three days prior to the time set for the hearing in such matter or cause."

Since the trial of the matter under discussion took place during April and May of 1955 and, since petitioner's affidavit of bias or prejudice was filed almost a year after the trial of the matter, it is the contention of the Committee that the filing thereof was not timely, and that the affidavit was not effective to stop the orderly processes of the Common Pleas Court under authority of the order of the Court of Appeals.

In our case, certainly, the affidavit was not filed either at the earliest possible moment when Mr. Crow knew who the trial judges were to be, nor before the beginning of the trial.

An examination of the affidavit of prejudice filed by Mr. Crow discloses that his first seven specifications of alleged bias or prejudice occurred during the trial of the case, almost a year before the affidavit of prejudice was filed.

It is the contention of the Committee that the laws governing the filing of affidavits of bias or prejudice are intended as a shield, and not as a sword, and that a party, after participating in the trial of a matter for eight days, and after entry of judgment, and after appeal, cannot then, by the expedient of filing an affidavit of prejudice more than ten months after the trial was concluded, prevent the

judges who heard the testimony from making separate findings of fact and conclusions of law, and re-entering judgment, in accordance with the order of the appellate court.

Attention is directed to the next to the last sentence of Sec. 2701.03 of the Ohio Revised Code, which deals with the assignment of a judge in cases of prejudice, to-wit:

> "* * * The judge so assigned shall *try* such matter or cause * * *" (Emphasis added)

Obviously the statute contemplates that the question of prejudice shall be raised and disposed of prior to trial.

Reference is also made to the case of *Tari v. The State of Ohio*, 117 O. S., 481, the second syllabus of which says:

> "Such disqualification is waived unless objection be made thereto at the earliest available opportunity, and if known to the complaining party at or before the trial and if no objection be made in the trial court, will be deemed to be waived."

Quoting further from the language of the court at page 496 in the same case:

> "From the foregoing authorities and by the overwhelming weight of all authority, it is clear that the sound rule is that matters of interest or bias, or prejudice of the judge, except where it amounts to actual fraud, are to be regarded as private matters, concerning only the parties to an action, and not affecting public policy. Such matters affect only the qualification of the judge, and, if they affect the jurisdiction at all, they must relate only to the jurisdiction over the person, and not to the jurisdiction over the subject matter of the action."
>
> "By a like overwhelming authority, they are matters of privilege, and, whether they are guaranteed by a constitutional or a statutory provision, or by some principle of the common law, the privilege is regarded

as waived unless claimed at the earliest available opportunity."

Quoting further from the opinion of the court at page 491:

> "While it is well settled that jurisdiction over the subject matter cannot be conferred by consent, it is equally well settled that a submission on the part of a defendant without objection to being tried completes the jurisdiction over the person, and it is conclusively settled that such submission, followed by an actual trial and judgment, renders the judgment a finality, not subject to collateral attack, and not subject to direct attack in an error proceeding, unless the question was raised and the objection made in the trial court at or preceding the trial."

In any event, upon hearing of the affidavit of prejudice, the Chief Justice dismissed the same, and no bias or prejudice was found to exist, so that even if the alleged error complained of should be found to exist, it would not be such an error as was prejudicial to petitioner, and should be ignored.

QUESTION No. III (a)

Petitioner raises the question as to "what authority judges of the Court of Common Pleas have after court is adjourned." This situation arises due to the fact that Judges Kirk, Case and Dull, sitting by special assignment of the Chief Justice, prepared findings of fact and conclusions of law in this proceeding; prepared and placed upon record an entry in connection with said findings and filed a praecipe thereon during the period of time when said Court of Common Pleas of Champaign County, Ohio, was in adjournment.

It is true that on July 24, 1956, Judge Marion B. Owen of said local court filed with the clerk thereof the following journal entry, same being recorded in Minute Book No. 86, page 348 of said court:

"In re: the May, 1956 Term of this Court.
No. .....
Entry
Now comes the Court and declares the May, 1956, term of this Court adjourned to September 6, 1956.
Marion B. Owen
Judge"

Petitioner asserts that Judges Kirk, Case and Dull had no right, authority or power to act in the instant case because of the order of Judge Owen and while said court was in adjournment.

At this point the attention of the court is directed to Article 4, Section 3 of the Constitution of the state of Ohio:

"The Common Pleas
One resident judge of the court of common pleas, and such additional resident judge or judges as may be provided by law, shall be elected in each county of the state by the electors of such county; and as many courts or sessions of the court of common pleas as are necessary, may be held at the time in any county. Any judge of the court of common pleas may temporarily preside and hold court in any county; and until the general assembly shall make adequate provision therefor, the chief justice of the supreme court of the state shall pass upon the disqualification or disability of any judge of the court of common pleas, and he may assign any judge to any county to hold court therein." (As amended September 3, 1912.)

Pursuant to authority therein granted, Carl V. Weygandt, Chief Justice, the Supreme Court of Ohio, on the seventh day of April, 1955, made formal assignment of

three judges to the Court of Common Pleas of Champaign County, Ohio, in the following matter:

"State of Ohio
Assignment
of a
Judge of the Court of Common Pleas

Hon. Paul P. Dull, a resident Judge of the Court of Common Pleas of Mercer County, Ohio, is hereby assigned to temporarily preside and hold court in the Court of Common Pleas of Champaign County, Ohio, on Monday, April 18, 1955, and to continue therein until the court business on which he enters is completed.

This assignment is made under authority of the Constitution and statutes of Ohio.

s/ Carl V. Weygandt
Chief Justice,
The Supreme Court of Ohio

Issued under the Seal of the Court at Columbus, Ohio this 7th day of April, 1955.

Filed
April 18, 1955
O. R. Outram
Clerk of Court
Champaign County
M. B. 85, Page 468"

A similar order of assignment was made as to the appointment of Judges Kirk and Case, all of said assignments being filed for record in the Court of Common Pleas of Champaign County, Ohio, on the eighteenth day of April, 1955. The attention of the court is directed to the clear language used therein:

"and to continue therein until the court business on which he enters is completed."

It is the position of the Committee as to Question No. III (a) that the orders of appointment herein set forth lifted Judges Dull, Kirk and Case out from under the

operation of the entry filed by Judge Marion B. Owen on July 24, 1956, adjourning court until September 6, 1956. Under the authority conferred on said judges by the order of appointment from the Chief Justice, their situation, while sitting by assignment in Champaign County, is analogous to that existing in those counties of this state where the Common Pleas Court is composed of more than one judge.

Questions have arisen in some counties as to when there is an adjournment of a court thus composed of several judges. In the case of *Asa Waters v. Commissioners of Hamilton County*, 9 Ohio Decisions Reprint, 5, the court said:

> "Where the rules of the Court of Common Pleas, as in Hamilton County, provide that at the end of each term a joint session shall be held, and it has been the custom at such session to formally declare the preceding term adjourned, an adjournment by one of the judges of his separate session does not end the term."

There is no question but what Judge Owen had authority to adjourn the separate session of the Court of Common Pleas presided over by him, but that said action does not, in the judgment of the Committee, adjourn, curtail or effect a continuance of the term so as to prejudice the orders of a special court sitting by assignment. To so hold would lead to inextricable confusion, loss of valuable time and much unnecessary expense. Please again note the language of the assignment: "and to continue therein until the court business on which he enters is completed."

The Committee further desires to call the attention of the court to the fact that although the court of Judge Marion B. Owen was in adjournment from July 24 to September 6, 1956, he, Judge Owen, continued to function

as a court by approving "consent entries" in several cases and by preparing and filing with the clerk of courts of Champaign County opinions in a number of cases pending in said court.

In the case of *Joseph C. Paris v. Frank M. Coppock, et al.*, 4 Ohio Circuit Decisions, 654, the following interesting language is found on page 655:

> "We are of the opinion, then, that while the entry of an adjournment sine die * * * of a separate session held by one of the judges of the court of common pleas of this county, while one or more of the other judges were holding their several terms, would not have the effect of adjourning the whole court or of putting an end to the term; yet if all of the judges holding such separate terms should, on a given day, enter upon the journals thereof an adjournment sine die, and thereafter during the time that such term might have been held (viz.: up to the time when by virtue of the law the new term must begin), there was no meeting of said judges in joint session, and nothing to show that any of said judges undertook in any way to transact business at the court house as a court, that it must be held that the term ceases as shown by the journal, in this case, on July 3, 1891."

Please note the language used: *"and nothing to show that any of said judges undertook in any way to transact business at the court house a sa court."*

Public policy generally is favorable to courts remaining open from term to term. An interesting opinion upon this particular subject is found in the case of *State v. Rohrer*, 90 Ohio State, 167, in which the Supreme Court, by the court, said:

> "that our constitution provides that all courts shall be open—that is, as public business may demand; that a great many of the counties of this state have commendably followed the plan of having one term of

court open until the succeeding term begins, to the great advantage of counsel and the public; that this common custom has existed so long and is so general as to be tantamount to the unwritten common law.

"This court believes that the policy, generally adopted by the courts of common pleas of this state, of continuous open sessions until the next succeeding term formally opens, should be continued and commended."

The Committee is further advised that at least one member of the special court was informed of the fact that the court of Judge Marion B. Owen was in adjournment. By proceeding with the preparation of findings of fact and conclusions of law and preparing and filing an entry thereon, said special court was acting pursuant to authority granted by the Chief Justice and was not subject in any way to the order of adjournment of Judge Marion B. Owen.

The Committee is of the opinion that the rights of petitioner were in no wise prejudiced by the action taken on August 16, 1956, by the special court; that this assignment of error is highly technical; that same is without merit; that the trial court should not be reversed and to so do would affect adversely not only the instant case but could affect numerous other matters which were acted upon by the Court of Common Pleas of Champaign County, Ohio, between July 24 and September 6, 1956, when said court was in adjournment; that the judgment entered on August 16, 1956, is valid and that the Court of Appeals did not commit prejudicial error in failing to reverse the trial court in this matter.

CONCLUSION

The respondent Committee respectfully concludes that the petition of J. Harvey Crow for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD P. FAULKNER,
D. HARLAND JACKMAN,
EDWIN L. ENGLISH,
RUSSELL B. HOLDING,
In Propria Persona.